TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 293

UNEXCELLED CHEMICAL CORPORATION, FORMERLY UNEXCELLED MANUFACTURING COMPANY, INC., PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WEIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 26, 1952
CERTIORARI GRANTED OCTOBER 27, 1952

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APPENDIX

COMPLAINT.

(Filed Jan. 27, 1950.)

IN THE
DISTRICT COURT OF THE UNITED STATES.
FOR THE DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA, Plaintiff, vs. UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC., Defendant.	Civil Action. No. 87-50.

I.

The plaintiff, United States of America, by the United States Attorney for the District of New Jersey, acting under the direction of the Attorney General, brings this action against the defendant, Unexcelled Chemical Corporation, formerly Unexcelled Manufacturing Company, Inc., under the Act of June 30, 1936 (49 Stat. 2036; 41 U. S. C. 35-45), hereinafter referred to as the Act.

II.

Jurisdiction is conferred upon this Court by Section 2 of the Act, and by Title 28, United States Code, Sec. 1345.

III.

Defendant, Unexcelled Manufacturing Company, Inc., was incorporated under the laws of the State of New York on February 6, 1915, and at all times since February 1916 and continuously through July 15, 1946, was authorized to transact business in the State of New Jersey under the name of Unexcelled Manufacturing Company, Inc., maintained its principal office at 15 Exchange Place, in the City of Jersey City, County of Hudson, and manufacturing establishments and places of business in the Township of Cranbury, County of Middlesex, and the City of New Brunswick, County of Middlesex, all in the State of New Jersey. On May 31, 1946, pursuant to the provisions of a certificate of change of name which was filed with the Secretary of State of the State of New York, the defendant has operated under the name of Unexcelled Chemical Corporation, and has at all times since July 15, 1946, been authorized to transact business in the State of New Jersey under the name of Unexcelled Chemical Corporation, where it still maintains the same principal office, manufacturing estabishments and places of business as aforesaid within the jurisdiction of this Court.

IV.

Pursuant to Section 5 of the Act, the Secretary of Labor, on April 17, 1947, issued a complaint, charging, among other things, that in the performance of certain specified government contracts subject to the Act, the defendant knowingly employed certain named underage male and female persons a total of 3,830 days in the performance of said contracts, and that by reason of the knowing and wrongful employment of said minors, the defendant was indebted to the United States of America in the sum of $10 for each day that said minors were employed. Pursuant to the Act, and in accordance with the Rules of Practice prescribed by the Secretary of Labor for proceedings under the Act, a hearing examiner was duly appointed and charged with the duty of conducting a hearing and rendering a decision embodying his findings of fact, conclusions of law and recommendations. Pursuant to notice given to all interested parties, the hearing examiner conducted a hearing, at which time the parties appeared and submitted evidence relating to the matters in issue, and on February 25, 1949, said hearing examiner, on the basis of the entire record, found and determined that the defendant, Unexcelled Chemical Corporation, formerly Unexcelled Manufacturing Company, Inc., had knowingly employed certain named minors in the performance of government contracts for a total of 1,560 days contrary to the provision of said contracts and of the Act, and ordered that it, the said defendant, pay the United States of America the sum of $15,600 as liquidated damages resulting therefrom. No petition for review was filed by the defendant with the Chief Hearing Examiner within the 20-day period prescribed by

the Rules of Practice, as amended, and, in accordance with said Rules, the decision of the Hearing Examiner became final upon the expiration of said period.

V.

By reason of the finding and decision made in the proceeding set forth in paragraph IV hereof, defendant, Unexcelled Chemical Corporation, formerly Unexcelled Manufacturing Company, Inc., is indebted to the United States of America in the sum of $15,600. Defendant has refused and still refuses to pay the same.

Wherefore, plaintiff demands judgment against the defendant for the sum of $15,600, with lawful interest and costs.

ALFRED E. MODARELLI,
United States Attorney for the
District of New Jersey,
Attorney for Plaintiff.

By JOHN J. BARRY,
Assistant United States Attorney.

ANSWER.

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOR THE DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA, Plaintiff, vs. UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC., Defendant.	Civil Action. File No. 87-50. Answer.

Defendant, by its Attorneys, Lindabury, Steelman & Lafferty, for its Answer to the complaint herein:

1. Denies each and every allegation of paragraph V in said complaint contained.

As a First Separate and Complete Defense, alleges:

2. That the defendant did not knowingly employ any male person under 16 years of age or any female person under 18 years of age in the performance of the contracts referred to in the complaint.

3. That the said findings set forth in paragraph IV of

the complaint are not supported by the preponderance of the evidence and are not conclusive against this defendant in this Court.

As a Second Separate and Complete Defense, alleges:

4. That the alleged wrongful employment of minors set forth in the complaint occurred more than two (2) years prior to the commencement of this action. (§6, 61 Stat. 87, 29 U. S. C. A. §255.)

WHEREFORE, the defendant demands judgment dismissing the complaint together with the costs and disbursements of this action.

LINDABURY, STEELMAN & LAFFERTY,
By WM. ROWE,
A Member of the Firm.
TOLBERT, NUNAN & BONGARD,
By TALBOT M. MALCOLM,
Attorneys for Defendant.

[ENDORSED]

Service of the within Answer is hereby acknowledged this 16th day of February, 1950.
By JOHN J. BARRY.

NOTICE OF MOTION FOR SUMMARY JUDGMENT.

(Filed March 13, 1950.)

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA, Plaintiff, vs. UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC., Defendant.	C-87-50. Notice of Motion for Summary Judgment.

To: Lindabury, Steelman and Lafferty, Esquires,
24 Commerce Street,
Newark 2, New Jersey.

PLEASE TAKE NOTICE, that on Monday, April 3, 1950 at 10:00 o'clock in the forenoon, or as soon thereafter as this matter may be heard, at the Federal Building, Federal Square, Newark, New Jersey, we shall move before the United States District Court for the entry of a summary judgment in favor of the plaintiff, United States of America, and against the defendant, Unexcelled Chemical Corporation, formerly Unexcelled Manufacturing Company, Inc.

Motion for Summary Judgment by Plaintiff

Attached hereto and made a part hereof, is the motion for summary judgment which will be presented and argued on that day and at that place.

ALFRED E. MODARELLI,
United States Attorney.
By JOHN J. BARRY,
Assistant United States Attorney.

MOTION FOR SUMMARY JUDGMENT BY PLAINTIFF.

(Filed March 13, 1950.)

UNITED STATES DISTRICT COURT.
DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA, Plaintiff. vs. UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC., Defendant.	C-87-50. Notice for Summary Judgment by Plaintiff.

Plaintiff moves the Court as follows: That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a

summary judgment in plaintiff's favor for the relief demanded in the complaint, on the ground that the affirmative defenses set forth in the defendant's answer are insufficient as a matter of law and that there is, therefore, no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law; or in the alternative.

If summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, that the Court, at the hearing on the motion, by examining the pleadings and evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the actions as are just.

ALFRED E. MODARELLI,
United States Attorney.
By JOHN J. BARRY,
Assistant United States Attorney.

NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT.
DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA, Plaintiff, vs. UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC., Defendant.	C-87-50. Notice of Motion for Summary Judgment.

To: HON. ALFRED E. MODARELLI, United States Attorney, Federal Building, Newark, New Jersey.

PLEASE TAKE NOTICE that on Monday, April 3, 1950, at 10:00 o'clock in the forenoon, or as soon thereafter as this matter may be heard, at the Federal Building, Federal Square, Newark, New Jersey, we shall move before the United States District Court for the entry of a summary judgment in favor of the defendant, UNEXCELLED CHEMICAL CORPORATION, formerly Unexcelled Manufacturing Company, Inc., against the plaintiff, UNITED STATES OF AMERICA.

Attached hereto and made a part hereof is the motion

for summary judgment which will be presented and argued on that day and at that place.

LINDABURY, STEELMAN & LAFFERTY,
By: WM. ROWE,
Attorneys for Defendant.

MOTION FOR SUMMARY JUDGMENT BY DEFENDANT.

UNITED STATES DISTRICT COURT.
DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA, Plaintiff, vs. UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC., Defendant.	C-87-50. Motion for Summary Judgment by Defendant.

Defendant moves the Court as follows: That it enter, pursuant to Rule 56 of the Federal Rules of Civil Practice, a summary judgment in defendant's favor dismissing the

complaint on the ground that the alleged cause of action set forth in the complaint accrued more than two years prior to the commencement of this action. (Sec. 6, 61 Stat. 87, 29 U. S. C. A., Sec. 255.)

LINDABURY, STEELMAN & LAFFERTY,
By WM. ROWE,
Attorneys for Defendant.

[ENDORSED]

Service of the within Notice and Motion for Summary Judgment is hereby acknowledged, this 20th day of March, 1950.

JOHN J. BARRY,
Assistant U. S. Attorney.

OPINION.

(Filed June 22, 1951.)

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA, Plaintiff, vs. UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC., Defendant.	Civil Action No. 87-50. On Motion for Summary Judgment. Opinion.

APPEARANCES:

ALFRED E. MODARELLI, Esq., United States Attorney;

JOHN J. BARRY, Esq., Assistant United States Attorney, for the Government.

LINDABURY, STEELMAN & LAFFERTY, Esqs., Attorneys for Defendant.

TALBOT M. MALCOLM, Esq., and DOUGLAS H. THAYER, Esq., of Counsel.

Opinion

MEANEY, District Judge.

This is an action to recover liquidated statutory damages allegedly due the United States under the Walsh-Healey Act, 41 U. S. C. §35 et seq. Defendant moves for summary judgment on the ground that the action is barred by the two-year period of limitation prescribed by the Portal to Portal Act, 29 U. S. C. §255.

The pleadings disclose as undisputed facts that on April 17, 1947 the Secretary of Labor commenced an administrative proceeding charging defendant with knowingly employing minors in violation of the Walsh-Healey Act. After hearing, the trial examiner on February 25, 1949, found that defendant had knowingly employed certain minors and ordered that defendant pay the United States $15,600. as liquidated damages. The present action was instituted on January 27, 1950. The decision of the trial examiner indicates that the employment of the alleged minors occurred during the years 1942 to 1945. The question arises therefore whether the Government's alleged cause of action accrued at the time the alleged violations occurred, or at the time the trial examiner rendered his decision.

The Walsh-Healey Act, 41 U. S. C. §35, requires that contracts with the Government for the manufacture of materials in any amount exceeding $10,000. shall contain, among other representations and stipulations, the following: "That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract: * * *" The statute further provides, 41 U. S. C. §36, that the breach or violation of such a stipulation "* * * shall render the party responsible therefor liable to the

United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, * * *". This section provides also that any sums due the United States may be recovered in suits brought in the name of the United States by the Attorney General. The Secretary of Labor, or an impartial representative designated by him, is authorized by the Act, 41 U. S. C. §39, to hold hearings and make findings of fact with respect to alleged violations.

In *United States v. Craddock-Terry Shoe Corporation* (D. C. W. D. Va. 1949), 84 F. Supp. 842, it was stated by way of dictum that the time when the limitation of the Portal to Portal Act begins to run is the date of the administrative determination. This view was based on the reasoning that the statute contemplated administrative proceedings as a prerequisite to resort to the courts. The Court then went on to decide that the administrative findings were not supported by a preponderance of the evidence. On appeal the decision was affirmed with respect to the administrative findings, 178 F. 2d 760; however, the Court of Appeals expressly refrained from passing on the efficiency of the defense of limitations. In *United States v. Hudgins-Dize Co.* (D. C. E. D. Va. 1949), 83 F. Supp. 593, 597, it was held that "* * * the time limitation, even if applicable to the United States, runs only from the termination of the administrative proceedings, * * * because until that determination the United States had no cause of action." See also: *United States v. Lance, Inc.* (D. C. W. D. N. C. 1951), 95 F. Supp. 327; *United States v. Sweet Briar* (D. C. W. D. S. C. 1950), 92 F. Supp. 777, 781.

Although the above decisions are persuasive, the Court feels that the contrary result is compelled by reason of the recent decision of the Court of Appeals for this circuit in the case of *McMahon vs. United States* (3 Cir. 1950), 186 F. 2d 227. There a similar problem was considered arising under the Suits in Admiralty Act, 46 U. S. C. §741, et seq., and the Clarification Act, 50 U. S. C. App. §1291, et seq. In that case it was said, "A cause of action is a legal wrong, the thing which becomes a ground for suit." The Court ruled the causes of action therein arose at the time of injury and were barred by the two-year limitation contained in the Suits in Admiralty Act even though the right of action, i. e. the right to institute suit, did not accrue until the termination of administrative proceedings.

The basic legal wrong of which the Government complains herein is the employment of minors in breach of the stipulation required by statute. Such a breach immediately rendered the contractor liable to the Government for liquidated damages. It was at that time that the causes of action arose. Whether or not the United States could have immediately instituted suit is not material since under the Portal to Portal Act, as under the Suits in Admiralty Act, it is the "cause of action" not the "right of action" which is barred by the statutory limitation.

Since it is clear, in view of the above analysis, that this action was commenced more than two years after the causes of action arose, defendant's motion will be granted.

An order may be submitted.

ORDER FOR JUDGMENT.

(Filed June 29, 1951.)

UNITED STATES DISTRICT COURT.
DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA, Plaintiff, vs. UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC., Defendant.	Civil Action No. 87-50. On Motion for Summary Judgment. Order for Judgment.

This cause came on for hearing on cross-motions of the plaintiff and defendant for summary judgment, the motion for the plaintiff being on the ground that the affirmative defenses in the answer were insufficient in law and the motion of the defendant being on the ground that the action was not timely brought and is barred by Sec. 6, 61 Stat. 87, 29 U. S. C. A. Sec. 255, and this Court having heard JOHN J. BARRY, Esq., Assistant United States Attorney, of counsel for ALFRED E. MODARELLI, Esq., then United States Attorney, for the plaintiff, and TALBOT M. MAL-

Order for Judgment

COLM, Esq., of counsel for LINDABURY, STEELMAN & LAFFERTY, Esqs., for the defendant, and the Court having rendered its opinion denying the motion of the plaintiff and granting the motion of the defendant, it is

ORDERED that the motion of the plaintiff for judgment be and the same hereby is denied; and it is

FURTHER ORDERED that the motion of the defendant for judgment dismissing the complaint be and the same is hereby granted and the complaint be and it hereby is dismissed; and

FURTHER ORDERED that judgment be entered dismissing the complaint without costs.

/s/ THOMAS F. MEANEY,
United States District Judge.

June 29th, 1951.

Notice of Appeal

NOTICE OF APPEAL.

(Filed Aug. 20, 1951.)

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA, Plaintiff, vs. UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC., Defendant.	Civil Action No. 87-50. Notice of Appeal.

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Final Judgment entered in this action on June 29, 1951.

GROVER C. RICHMAN, JR.,
United States Attorney.
By JOHN J. BARRY,
Assistant United States Attorney.

Order

ORDER.

(Filed Sept. 18, 1951.)

UNITED STATES DISTRICT COURT.
DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA, Plaintiff, vs. UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC., Defendant.	Civil 87-50. Order.

Upon the motion of Grover C. Richman, Jr., United States Attorney for the District of New Jersey and upon good cause having been shown,

It is on this 18th day of September 1951, pursuant to Rule 73 (g) of the Federal Rules of Civil Procedure ORDERED that the time within which the Clerk of the United States District Court for the District of New Jersey is to forward the record on appeal in this cause to the United States Court of Appeals for the Third Circuit be and the same is hereby extended to November 16, 1951.

THOMAS F. MEANEY,
Judge,
United States District Court.

ORDER.

UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

(Case No. 10,612.)

UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC., Defendant-Appellee.	On Appeal. Order.

Upon the motion of Grover C. Richman, Jr., United States Attorney for the District of New Jersey, and the annexed consent of counsel for the defendant-appellee and there being good cause shown for the entry of this order;

It is on this 13th day of December 1951, ORDERED that the time for filing the brief of the plaintiff-appellant be and is hereby extended to January 4, 1952.

McLAUGHLIN,
Judge.

We hereby consent to the entry of the above Order.

LINDABURY, STEELMAN & LAFFERTY,
Attorneys for Defendant-Appellee.
By WILLIAM ROWE,
A Member of the Firm.

DECISION OF THE HEARING EXAMINER.

UNITED STATES OF AMERICA.

WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS
OF THE
UNITED STATES DEPARTMENT OF LABOR.

(No. PC-352.)

In the Matter of UNEXCELLED MANUFACTURING CO., INC., now known as UNEXCELLED CHEMICAL CORPORATION, Respondent.	Decision of the Hearing Examiner

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BEFORE: CLIFFORD P. GRANT, Hearing Examiner.

APPEARANCES:

JOHN A. HUGHES, Esq. and FRANCIS V. LaRUFFA, Esq., for the Government.

A. HARRY MOORE, Esq. and THOMAS E. LYNCH, Esq., for the Respondent.

This proceeding under Section 5 of the Act of June 30, 1936 (49 Stat. 2036; U. S. C. ti. 41, secs. 35-45), known as the Walsh-Healey Public Contracts Act and hereinafter referred to as the Act, was initiated upon the issuance by the Secretary of Labor of a complaint[1] alleging, in substance, that in the performance of certain Government contracts subject to and containing the representations and stipulations of the Act, the respondent knowingly employed boys and girls under sixteen years of age in breach of the contracts and in violation of the Act, and knowingly employed girls under eighteen years of age contrary to the provisions of the contracts and to the terms of exemption orders permitting their employment.[2]

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[1] The complaint was filed April 22, 1947; other principal docket entries are: Answer filed June 13, 1947; Notices of Motions to Amend Complaint filed August 9, 1947 and September 12, 1947; Transcript of Hearing held in Trenton, New Jersey, on September 16 and 17, 1947, filed October 6, 1947; Transcript of Hearing held Asbury Park, New Jersey, on September 24 and 25, 1947, filed October 8, 1947; Transcript of Hearing held in New York, New York, on October 6 and 7, 1947, filed October 13, 1947.

[2] One of the stipulations required by Section 1 of the Act to be included in contracts subject thereto prohibits outright the employment by the contractor of boys under sixteen years of age and girls under eighteen years of age in the performance of such contracts. Section 2 of the Act provides in part that a breach or violation of the child-labor stipulation in a contract shall render the party responsible therefor liable to the United States of America for liquidated damages in the sum of $10 per day for each underage employee knowingly employed in contract performance.

By order dated April 21, 1942 applicable to given industries, and again by order dated November 11, 1942 applicable to all industries,

Decision of the Hearing Examiner

In its answer the respondent denies the substantive allegations of the complaint and affirmatively alleges three separate defenses: (1) that it was without knowledge that the employees named in the complaint were below the required age, (2) that any act or omission complained of was in good faith in conformity with and in reliance on the administrative regulations, orders, rules and interpretations of various agencies of the United States, in that the employees named were first interviewed by representatives of the United States Employment Service and were then duly certified to the respondent as being available and able to undertake employment with the respondent pursuant to the rules and regulations of the War Manpower Commission, and (3) that the girls listed in paragraph VII of the complaint were employed in conformity with and in reliance on the aforementioned exemption orders, that none of the conditions of the exemption orders were violated and further, that the employees last referred to were not employed in an occupation in or about any plant manu-

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the Secretary of Labor relaxed the age limitations and granted an exemption from the application of Sections 1 and 2 of the Act to the extent of permitting the employment in contract performance of girls sixteen and seventeen years of age upon compliance with each of six enumerated conditions drafted for the protection of the girls affected.

Paragraph VI of the complaint lists the names of boys and girls alleged to have been knowingly employed in contract performance while under sixteen years of age. Paragraph VII lists the girls alleged to have been so employed while under eighteen years "in occupations declared to be hazardous under the Fair Labor Standards Act of 1938", prohibited by the third condition of the aforementioned exemption orders, quoted as follows:

> "(3) That no girl under eighteen years of age shall be employed in any operation or occupation which, under the Fair Labor Standards Act or under any State law or administrative ruling, is determined to be hazardous in nature or dangerous to health."

At the outset of the hearing (Tr. p. 8) paragraph VII of the complaint was amended on motion of Government counsel to allege that the girls under eighteen were also employed in occupations declared to be hazardous under the laws of the State of New Jersey, contrary to the same condition quoted above; and further, that they were employed between the hours of 10:00 P. M. and 6 A. M., contrary to the second condition of the exemption orders.

facturing explosives or articles containing explosive components[3].

Upon the entire record, including the pleadings, testimony, exhibits and stipulations of counsel, I issue the following decision embodying my findings of fact and conclusions of law.

1. The respondent Unexcelled Manufacturing Company, Inc., was incorporated under the laws of the State of New York in February, 1915. At all times since February 1916 and continuously through July 15, 1946, respondent was authorized to transact business in the State of New Jersey under the name of Unexcelled Manufacturing Company, Inc. It maintained its principal office at 15 Exchange Place, in the City of Jersey City, County of Hudson, and manufacturing establishments in the Township of Cranbury, County of Middlesex, and in the City of New Brunswick, County of Middlesex, all in the State of New Jersey. Pursuant to a certificate of change of name filed with the Secretary of State of the State of New York, respondent has operated under the name of Unexcelled Chemical Corporation and at all times since July 15, 1946, has been authorized to transact business in the State of New Jersey under that name, maintaining its principal office and manufacturing establishments at the same locations.

2. That respondent was awarded by the Government of the United States the following contracts, on the dates, in the amounts, and for the commodities or purposes set opposite each of them:

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[3] Pursuant to authority delegated by Section 3(1) of the Fair Labor Standards Act, the Chief of the Children's Bureau in the Department of Labor issued Hazardous Occupations Order No. 1, effective July 1, 1939, declaring all occupations in or about any plant manufacturing explosives or articles containing explosive components to be particularly hazardous for the employment of minors between 16 and 18 years of age. The revision effective February 13, 1943, delimiting application of the order to plants manufacturing small-arms ammunition, is not material here.

Contract No.	*Date of Award*	*Amount*	*Commodity or Purpose*
NOs-LL95813	2-11-42	$1,740,000	Loading and assembly of 20 mm. anti-aircraft ammunition, high explosive tracer type.
NXso-LL7941	9-28-42	576,000	Loading and assembly of 20 mm. anti-aircraft ammunition, high explosive tracer type.
NOrd-3745	6-9-43	1,300,000	Loading and assembly of 20 mm. H.E.I. (Incendiary) ammunition.
NOrd-3792	6-5-43	45,000	Incendiary pellets and preparation of compound for pelleting 20 mm. ammunition.
NOrd-4717	10-30-43	52,000	Incendiary pellets for 20 mm. ammunition.
NOrd-6084	4-29-44	1,394,400	Loading and assembly of 20 mm. H.E.I. ammunition.
NOrd-6567	7-6-44	561,345	Aircraft engine starter cartridges.
NOrd-6793	8-1-44	59,400	Incendiary pellets for 20 mm. H.E.I. ammunition.
W-30-070-CWS-697	8-21-44	450,385.68	Loading of fuse, British No. 42, Mark IV: Assembly, loading and packing of capsules for the fuses; and Assembly, loading and packing of burster and adapter.

W-30-069-ORD-2170	9-4-44	497,700	Signal, distress, 2 star red T-49.
W-30-070-CWS-1030	11-24-44	56,250	Loading of powder bags.
W-30-070-CWS-1240	5-12-45	1,532,160	Bomb clusters, incendiary AN-M69.
W-12-083-CWS-13	4-17-45	209,484	Boosters and bursters for bomb MK-1, SPD.
W-30-070-CWS-1434	6-18-45	99,900	Loading, packing, boxing and marking of fuses, delay; also, tools, dies, etc.
W-30-070-CWS-1502	8-11-45	92,400	Loading, packing, boxing and marking of fuses, instantaneous.

Contract No.	*Date of Award*	*Amount*	*Commodity or Purpose*
W-672-ORD-2848	7-26-40	101,640	Ground signals.
W-613-ORD-1504	10-22-40	110,656	Bombs, photoflash, M23.
W-613-ORD-1569	10-13-41	1,462,500	Flares, aircraft, parachute, M26, less fuses.
W-613-ORD-1695	3-7-42	1,477,500	Flares, aircraft, parachute, M26.
W-613-ORD-2118	6-13-42	4,881,750	Flares, aircraft, parachute, M26, assembly complete (less fuse).
W-670-ORD-2814	9-9-42	296,400	Shells, illuminating, M83, body, assembly, complete (loaded) 60 mm. mortars, M1 and M2.
W-613-ORD-4685	5-5-43	157,500	Flares, aircraft, parachute, AN-M26.

W-613-ORD-4686	5-5-43	48,750	Flares, aircraft, parachute, M-26, renovation.
W-613-ORD-4771	5-21-43	515,475	Shells, illuminating, M-83, body assembly, complete (loaded), 60 mm. mortars M-1 and M-2.
W-613-ORD-5122	8-12-43	645,000	Ground signals, white star, parachute M17A1.
W-30-069-ORD-747	1-31-44	20,000	Flares, ground, red T9 and yellow T10.
W-30-069-ORD-844	2-17-44	61,250	Superflash and sound (dago) bombs.
W-30-069-ORD-984	3-11-44	488,000	Shells, illuminating, body assembly, complete, loaded, 60 mm. mortar M83.
W-30-070-CWS-620	4-15-44	375,375	Ignition cylinders for portable flame throwers.
W-30-069-ORD-2277	11-30-44	276,030	Leaflet bombs T1; also expelling charges.
W-30-070-CWS-1041	12-9-44	337,500	Ignition cylinders for portable flame throwers.
W-30-069-ORD-2669	11-25-44	23,000	Superflash and sound (dago) bombs.
NOrd 5743	3-14-44	77,500	Salvaging of 20 mm. and 40 mm. primed cartridge cases.

3. The thirty-three contracts[4] listed above were subject to and contained, either in text form or by reference, the representations and stipulations of the Act.

4. The following named female persons were knowingly employed by the respondent in the performance of one or more of the thirty-three Government contracts listed above while under sixteen years of age, for the number of days and during the periods set opposite their names:

Dorothy Armstead	Sixteen (16) days in the period from July 31, 1945, to August 14, 1945.
Clara Baxter	Forty-two (42) days in the period from June 26, 1945, to August 14, 1945.
Anna Mae Blount	Two (2) days in the payroll week ending July 24, 1945.
Dolores Olabell Eure	Ten (10) days in the period from July 24, 1945, to August 7, 1945.
Lucille Anna Haynes	Two (2) days, on February 21, 1944, and February 22, 1944.
Florence Holliday	Twenty-one (21) days in the period from July 10, 1945, to August 7, 1945.

[4] Certified copies of the thirty-three contracts are in evidence in this proceeding as Government Exhibits 1-A through 1-CG, inclusive. Three additional contracts, Nos. DA NOrd-(F)1089, NOrd-(F)1269, and W-30-070-CWS-1143, listed in the complaint with those received in evidence, were eliminated from the case by agreement at a pre-hearing conference held in this matter on September 4, 1947. Near the conclusion of the hearing it was further agreed that a fourth contract, No. NOrd-6083, the remaining contract of the thirty-seven originally listed in the complaint and the last of the four contracts which the answer of the respondent specifically alleged as not being subject to the Act, could also be eliminated from the case without affecting the number of days agreed upon as the number of days which given employees, whose names will appear in the next two enumerated findings of fact, were employed in contract performance (Tr. pp. 589-594). A certified copy of Contract No. NOrd-6083 is in evidence as Government Exhibit No. 2.

Frizella Inman	Twenty-four (24) days in the period from July 10, 1945, to August 7, 1945.
Bernice McCoy	Seventeen (17) days in the period from July 24, 1945, to August 7, 1945.[5]
Ethel Morrison	Ten (10) days in the period from July 24, 1945, to August 7, 1945.
	Total—144 days.

The nine employees were born on the respective dates[6] appearing beside their names, two being fourteen years of age and seven being fifteen years of age during their respective periods of employment on the Government contracts:

Dorothy Armstead	February 26, 1930.
Clara Baxter	March 26, 1930.
Anna Mae Blount	August 25, 1930.
Dolores Olabell Eure	April 8, 1931.
Lucille Anna Haynes	August 11, 1928.
Florence Holliday	November 16, 1929.
Frizella Inman	December 18, 1929.
Bernice McCoy	March 18, 1930.
Ethel Morrison	January 13, 1930.

[5] Although the period from July 24, 1945 to August 7, 1945 does not include as many as seventeen days, as alleged in the complaint, the discrepancy is not material. The number of days this and other employees were employed in contract performance is agreed upon (Tr. pp. 589-594) and accordingly is the basis for measuring respondent's liability in liquidated damages. The periods of employment, on the other hand, are merely descriptive and are of secondary importance.

[6] All of the nine employees testified to their dates of birth which have been verified by certified copies of State birth records submitted by the Government for all except one, Lucille Anna Haynes, for whom no record of birth was found and whose testimony is consequently the sole evidence of her date of birth. The birth certificates of the eight employees are included among those sent to me by counsel for the Government after the close of the hearing in accordance with an understanding to that effect (Tr. pp. 639, 641) and received without objection as Government Exhibit No. 9.

In a series of earlier decisions in proceedings of this kind the Secretary of Labor has interpreted the term "knowingly" in Section 2 of the Act and has defined the obligation of the contractor not to employ child labor and the circumstances under which liability attaches for his failure to meet that obligation.[7] The pertinent facts relating to the hiring of each of the nine girls named above are much the same. By their own testimony all but one, Ethel Morrison, who applied directly at respondent's plant, first called at the office of the United States Employment Ser-

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[7] "'Knowingly' in Section 2 modified 'employed' and must be and has been interpreted to mean knowledge of facts relating to the employment of boys under 16 and girls under 18 on Government contracts." Decision of the Secretary, *In the Matter of the Winkley Company*, No. P. C.-239, March 10, 1947.

"The inquiry on the issue of knowing employment is whether respondents knew or should have known that the girls, as to whom the violations occurred, were under 18." Decision of the Secretary, *In the Matter of American Furnace Company*, No. P. C.-220, March 10, 1947.

"The sense of the term 'knowingly' in Section 2 is in no way as highly restrictive and unreal as respondent urges. The term means considerably more than affirmative knowledge present in the mind of respondent's principal officer. Its meaning is derived from the nature of the obligation under the Act not to hire child labor. This obligation includes the responsibility to take measures to comply with the child labor provisions. The measures which must be taken are those which a careful contractor would take. A contractor whose violation of the child labor provision is traceable to failure to observe this standard of care cannot say that the minor was not knowingly employed. *In the Matter of Philip Low*, P. C.-110, April 19, 1946; *In the Matter of Sitterding, Carneal, Davis Co., Inc.*, P. C.-193, July 6, 1945; *In the Matter of Len J. Bray*, P. C.-150, May 3, 1945; *In the Matter of H. T. Barnes and Leroy Jones*, P. C.-163, April 17, 1945." Decision of the Secretary, *In the Matter of Sonora Radio & Television Co.*, No. P. C.-173, July 25, 1946.

"This obligation [not to employ underage minors] carries with it the duty to take measures to comply with the stipulation. When facts come to the attention of the contractor which would create a suspicion in the mind of a careful contractor that the obligation is not being performed, the contractor has a duty to exercise reasonable care to make sure that he is not violating his contract. If he fails to do so, he cannot then say that the children were not knowingly employed." Decision of the Secretary, *In the Matter of Sitterding, Carneal, Davis Co., Inc., supra.*

"If the situation is one in which a careful contractor would have investigated, the respondent is required to investigate. These situations generally involve presence of facts which would have caused the careful contractor to suspect that the applicant's age might be below the minimum. That the facts would not have caused him to believe or even to suspect that the applicant *was* below the required age is no answer to the duty to observe the prohibition if those facts would have raised a suspicion that the applicant *may have been* under age." Decision of the Secretary, *In the Matter of Rogers Tent and Awning Company*, No. P. C.-170, May 8, 1946.

Like language appears in the Secretary's decisions, *In the Matter of Wilkins Trunk Manufacturing Company, et al.*, No. P. C.-206, April 22, 1946; *In the Matter of Bauer Pottery Company, Inc.*, No. P. C.-318, March 15, 1948; *In the Matter of Bibb Manufacturing Company*, No. P. C.-191, November 6, 1947.

vice where they were given a so-called "referral card" showing that the applicant was being referred to respondent for employment in response to its request and certifying "that the hiring of this worker for the employment specified above is in accordance with the War Manpower Commission Employment Stabilization Program, and no accompanying statement of availability is required." Some several of the girls testified either that they were asked in the office of the Employment Service how old they were or were told they had to be eighteen to work in respondent's plant. Those who were so asked or told represented to the person interviewing them that they were eighteen. All nine of them, in applying shortly thereafter at the employment or personnel office of the respondent, represented that they were eighteen years of age. These and other underage applicants were not asked by employing officers of the respondent to produce birth certificates or other verification of age. It is quite evident that it was the practice to employ applicants without questioning the age of any who represented that they were eighteen or furnished a date of birth indicating that they had attained the age of eighteen years.[8] In the case of these nine, their misrepresentation of age should not excuse the respondent of liability in liquidated damages for their employment. From my observation of each of them in the hearing room and on the witness stand, I am convinced that they were of such youthful appearance that a careful or reasonably prudent contractor, mindful of his obligations under the Act, would not have been content to take their uncorroborated statements as conclusive of their age, but would have made further inquiry to ascertain whether they were old

[8] Respondent's Exhibit No. 1 consists of the employment applications of forty-three employees and the Employment Service referral cards for most of them, all that respondent could produce for the sixty-four employees who appeared and testified at the hearing. Of the nine girls presently under consideration, the exhibit includes the employment applications and referral cards of two, Dorothy Armstead and Lucille Anna Haynes.

enough to be employed.[9] Their appearance was such, in other words, to put the respondent on notice that they were or may have been under eighteen years of age, the statutory minimum. Since they were not of age eligible for employment under the exemption orders hereinbefore mentioned, the orders have no application and whether or

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[9] "The youthful apearance of an applicant for employment is a fact which would arouse suspicion in the mind of the careful contrator that he may not be performing his contractual obligation not to employ underage children. If the contractor disregards this fact he cannot avoid liability by asserting his lack of knowledge of the ages of his employees. He must then make further inquiry.

"In order to resolve the suspicion caused by notice of such facts as youthful appearance, the contractor is not required to obtain some specific type of proof of age. But there must be something more than mere statements of age by the applicant or by his parents." Decision of the Secretary, *In the Matter of Sitterding, Carneal, Davis Company, Inc., et al.*, No. P. C.-193, dated July 5, 1945.

"The Trial Examiner had the opportunity to observe this boy at the trial and determined that even at that date his appearance was so youthful that a careful contractor would not have hired him without first checking with reliable sources to determine his true age. This duty to inquire obviously cannot be met by merely asking the child whether he is old enough to work. Responsibility for the performance of the child labor provision is placed on the contractor, not on the child. Nor is it sufficient to check the child's representation with his parents or friends. Verification of age consists of something more than mere statements from persons either so interested or so inexpert as parent or friend. It consists of checking with responsible and impartial sources of record, such as those maintained by churches, government and schools and including those made contemporaneously with the child's birth, such as an entry in a family Bible. Since respondent had reason to suspect that the boy may have overstated his age and since it failed to make reasonable inquiry to determine his true age, it must be held to have knowingly employed him." Decision of the Secretary, *In the Matter of Craddock-Terry Shoe Corporation*, No. P. C.-330, dated April 7, 1948.

"The only step which respondent ever took was to ask Emanuel for his age at some point after the boy had begun to work. The minor was the least reliable of the sources of information which were available to respondent and the duty to investigate was in no way discharged by the adoption of methods as casual and inconsequential as this." Decision of the Secretary, *In the Matter of Rogers Tent and Awning Company*, No. P. C.-170, dated May 8, 1946.

not their employment conformed to the conditions specified therein is immaterial.

The referral by the United States Employment Service of applicants who later proved to be underage has been the subject of decision by the Administrator in another of the earlier proceedings wherein he rejected the argument of the contractor that such referral precluded a finding of knowing employment.[10] Since the issuance of that decision, Congress has enacted the Portal-to-Portal Act of 1947.[11] Respondent's second separate defense in its answer to the complaint seeks to invoke the provisions of Section 9 of that Act[12] in an attempt to avoid liability for the employment of minors referred by the United States Employment Service. Section 9, however, by its terms relates only to liabilities resulting from the failure of an employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act and the Walsh-Healey Public Contracts Act. Moreover, the respondent has not shown nor do I believe it can show that its employment of child labor, whatever its good faith reliance thereon, was in

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[10] *In the Matter of T. M. Wise, individually and doing business as Southern Tent and Awning Company,* No. P. C.-269, September 30, 1946.

[11] Enacted May 14, 1947.

[12] Section 9 reads: "In any action or proceeding commenced prior to on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

actual conformity with an administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy of an agency[13] of the United States.

Seven other employees named in paragraph VI of the complaint as having been employed in performance of the Government contracts while under sixteen years of age testified as witnesses at the hearing. All of them, Clara Darby, Lois Livingston, Bloneva Parker, Clarence Robinson, Wilbur Stokes, Magalene Thomas and Mary Whiteside, are shown by competent evidence to have been in fact under sixteen years of age during the periods and for the number of days alleged in the complaint and agreed upon as the periods and days of their employment in performance of the contracts hereinbefore listed (Tr., pp. 589-594).[14] The circumstances under which they were hired are in all material respects the same as those already described. But in their case their appearance and demeanor in the hearing room and on the witness stand was not such as to enable me to say that a careful contractor would have suspected that they were under eighteen years of age. In the absence of any other facts or circumstances evidencing knowledge, either actual or constructive, on the part of respondent that they were not of age, I conclude that none of these seven were knowingly employed within the meaning of Section 2 of the Act.

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[13] For definition of "agency" as used in Section 9 of the Portal Act, see *Jackson* v. *Northwest Airlines*, 76 Fed. Supp. 121.

[14] Government Exhibit No. 9 includes birth certificates evidencing the dates of birth of the seven employees, except Magalene Thomas, whose birth certificate was introduced and received at the hearing as Government Exhibit No. 5. Only part of the periods of employment alleged in the complaint for two of the employees, Clara Darby and Bloneva Parker, preceded their sixteenth birthday. Clara Darby was born on April 29, 1929. According to her birth certificate, the most reliable evidence of her birth date, Bloneva Parker was born on November 23, 1928. The entire periods of employment alleged in paragraph VI of the complaint for the remaining five employees transpired while they were under sixteen years of age.

5. The following named female persons among those listed in paragraph VII of the complaint were knowingly employed by the respondent in the performance of one or more of the thirty-three Government contracts while sixteen and seventeen years of age, for the number of days and during the periods set opposite their names. The respective days of their births,[15] as I find them to be, are also given and appear below the names of each:

Mildred Frances Braxton (Mildred Braxton Shack) Born: October 5, 1928.	Forty-four (44) days in the period from June 26, 1945, to August 14, 1945.
Marjorie E. Haywood (Marjorie Hayward) Born: December 5, 1928.	Twenty-eight (28) days in the period from July 17, 1945, to August 21, 1945.
Kay Louise Hemstead (Kay Louise Hempstead) Born: September 19, 1927.	Eight (8) days in the period from July 3, 1945, to July 10, 1945.
Flora Hester Born: November 6, 1926.	Three (3) days in the payroll week ending April 18, 1944.
Margaret Johnson Born: December 15, 1928.	Ten (10) days in July, 1945.
Carrie Belle Legette Born: February 26, 1928.	Thirty-eight (38) days in the period from June 19, 1945, to August 17, 1945.
Arina McKellar (Arlena McKellar) Born: October 10, 1927.	Seven (7) days in the period from July 24, 1945, to July 31, 1945.

[15] The dates are taken from certified copies of State birth records for all except Lucretia Perry and Maggie Berry for whom no record of birth was found and whose dates of birth are taken from their testimony. The birth certificates of Marjorie Hayward and Lois Wertzs were read into the record at the hearing (Tr. pp. 79, 206) in lieu of their introduction as exhibits. The birth certificates of all the others are included in Government Exhibit No. 9.

Elenor McLaughlin (Eleanor McLaughlin Jameson) Born: August 5, 1925.	One hundred forty-seven (147) days in the period from November 3, 1942, to July 27, 1943.
Klyda Grace Mahoney Born: December 29, 1927.	Twenty (20) days in the period from July 14, 1945, to August 6, 1945.
Jean Phyllis Mariner (Mrs. Donald Stewart) Born: July 31, 1927.	Three hundred fourteen (314) days in the period from July 4, 1944, to July 29, 1945.
Lucretia Perry (Lucretia James) Born: October 31, 1927.	Eleven (11) days in the period from April 18, 1944, to May 2, 1944.
Audrey Ramsey Born: April 6, 1927.	Forty-one (41) days in the period from February 29, 1944, to April 18, 1944.
Beulah Urstadt Seefeld Born: August 9, 1925.	Eighty-two (82) days in the period from December 8, 1942, to August 7, 1943.
Doris Seefeld Born: October 17, 1927.	Twenty-three (23) days in the period from July 21, 1945, to August 14, 1945.
Evelyn Dorothy Soden Born: November 23, 1927.	Three hundred ninety (390) days in the period from May 16, 1944, to November 11, 1945.
Dorothy Steen (Dorothy Steen Skelding) Born: January 2, 1927.	Six (6) days in the period from February 15, 1944, to February 22, 1944.
Rose Swirski Born: March 17, 1926.	One hundred five (105) days in the period from November 3, 1942, to March 30, 1943.

Lois Wirtz (Lois Wertzs) Born: December 25, 1925.	Forty-seven (47) days in the period from October 19, 1943, to December 21, 1943.
Shirley Eileen Yorkus (Dorothy Shirley Irene Yorkus) Born: October 12, 1925.	Thirty-one (31) days in the period from May 11, 1943, to June 22, 1943.
Maggie Berry Born: December 31, 1927.	Five (5) days in the payroll week ending August 14, 1945.
Elenor Marie Stapon Born: May 9, 1926.	Sixteen (16) days in the period beginning with the payroll week ending March 9, 1943, through the payroll week ending March 30, 1943.
Betty Yorkus Born: February 18, 1927.	Forty (40) days in the period beginning with the payroll week ending October 26, 1943 through the payroll week ending January 4, 1944.
	Total—1,416 days.

All of the foregoing employment took place in the establishment of the respondent at Cranbury, New Jersey, except for the entire employment of Maggie Berry and a portion of the employment of Betty Yorkus in the firm's establishment at New Brunswick, New Jersey. Each of the two establishments, including all of the buildings and structures of which it is composed, constituted a "plant manufacturing explosives or articles containing explosive components" as the term is used in Hazardous Occupations Order No. 1, in its original form effective July 1, 1939, and as amended thereafter (Tr., pp. 621-4). All occupations in or about such plants having been declared under the Fair

Labor Standards Act to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years, the employment of the above-named girls throughout the respective periods they were employed while 16 and 17 years of age was contrary to the third condition of the Secretary's exemption orders of April 21, 1942, and November 11, 1942. Noncompliance with any one of the six conditions of the exemption orders rendered the orders inoperative and the employment of the girls illegal under Section 1(d) of the Act. Decision of the Secretary, *In the Matter of Sonora Radio and Television Company,* supra. The evidence establishes, nevertheless, that many of them[16] were employed on the night shift after 10:00 p. m., contrary to the second condition of the exemption orders.

The hiring of the girls 16 and 17 years of age followed the same general pattern of those under 16. Most of them, as shown by their testimony and the referral cards in Respondent's Exhibit No. 1, were referred to the respondent by the United States Employment Service. In every instance except a few to be mentioned later, the employee represented that she was 18 years of age or over and gave a corresponding birth date. They were not required or requested to furnish anything in verification of their representations of age before being hired.

In the case of seventeen, or all but five of the twenty-two girls, the finding that they were knowingly employed rests upon their youthful appearance which distinguished them

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[16] Mildred Frances Braxton, Kay Louise Hemstead, Flora Hester, Margaret Johnson, Carrie Belle Legette, Arine McKellar, Klyda Grace Mahoney, Lucretia Perry, Audrey Ramsey, Buelah Seefeld, Doris Seefeld, Dorothy Steen and Maggie Berry were employed on the night shift during the entire periods of their employment. Elenor Marie Stapon and Betty Yorkus were employed on the night shift during a portion of their employment. Rose Swirski might have worked one or two nights but she could not say whether it was before or after she became 18 years of age (R. 441, 449).

from a larger number of 16 and 17 year old girls testifying at the hearing and satisfied me that the respondent should not have employed them without first investigating to ascertain their true age. Certainly, in their case, the respondent had good reason to question their representations of age.

The remaining five, namely, Lucretia Perry, Audrey Ramsey, Lois Wirtz, Maggie Berry and Elenor Marie Stapon, were among those whom I determined at the hearing (Tr., p. 579) were not of such youthful appearance as to cause the respondent to suspect that they were under the age of 18 years. The finding that they were knowingly employed subsequently rests upon facts other than youthful appearance.

In making out her application for employment, Lucretia Perry recorded her date of birth as October 31, 1926, a year in advance of her actual birth date. In contrast with the age of "18" which she also recorded in her application, the date of birth given by her shows that she was then but seventeen years of age. Respondent was thus put on notice of the probability that the applicant might have been seventeen rather than eighteen, which if true precluded her employment in either of its two plants under the terms of the exemption orders. Respondent should have undertaken to resolve the discrepancy in age. Had it done so, it would have found that the applicant was in fact not of age. Its failure to require corroboration of the applicant's age resulted in her employment in violation of the Act.

Audrey Ramsey, who was also sixteen years of age when she applied for employment with the respondent, likewise gave a date of birth (April 6, 1926) indicating that she was seventeen, at the same time giving the conflicting age of eighteen. Lois Wirtz was employed despite the fact that her employment application, while showing the age of

eighteen, recorded her true date of birth, December 25, 1925. With no material difference in the facts, the basis upon which these two underage employees are held to have been knowingly employed is the same as in the preceding case of Lucretia Perry.

Maggie Berry consistently maintained throughout her testimony that she recorded her true date of birth, December 31, 1927, in filling out her application for employment. Although the birth date of "Dec. 31, 1926" is written in on the application, as well as the age of "18", it is plainly evident that the last figure in the year as originally written has been erased and changed from "7" to "6". I have no hesitancy in finding, from the altogether credible and uncontradicted testimony of the employee and the evidence as a whole, that the employee did record her date of birth as she said she did. Why the respondent employed her in spite of the birth date showing that she was seventeen years of age can only be left to conjecture, as must also the identity of the person who altered the employment application and the reason for so doing. In this connection, attention is directed to the statement of counsel for the respondent at the conclusion of the hearing concerning the respondent's inability to locate former war-time personnel for presentation as witnesses who might be also to throw some light on the operation of its employment offices (Tr., beg. p. 629). The best that can be said for the respondent, in any event, is that the employment of Maggie Berry was the result of respondent neglecting to investigate her true age.

A fact upon which the testimony of Elenor Marie Stapon is clear is that about a month after she applied for work at the Cranbury plant of the respondent she furnished to someone in the personnel office, in response to a request that she bring in proof of her age, a baptismal certificate[17]

[17] The certificate is contained in Government Exhibit No. 9.

showing that she was born on May 9, 1925, the date of birth given in her application for employment. The certificate appears to be entirely regular on its face and there is nothing in the record of the case to suggest that it was not reliable evidence of the employee's age. The respondent was entitled to treat it as such. Decision of the Secretary, *In the Matter of Bibb Manufacturing Company,* supra. It is for this reason that I have found her to have been knowingly employed for sixteen days, the extent of her employment while under eighteen years of age according to the certificate, rather than for the full duration of her employment while under eighteen on the basis of her true date of birth.

Counsel for the Government apparently are of the belief, as indicated in the letter submitting the birth certificates, that evidence other than youthful appearance supports the finding of knowing employment with respect to a sixth employee, Madaline Audrey Hartman. I have searched the record without finding any such evidence; nor do I find any evidence of knowing employment with respect to twenty-five other girls who are listed in paragraph VII of the complaint and who presented the appearance of being eighteen years of age or more when testifying at the hearing.

6. On May 23, 1942, a judgment was entered under Section 17 of the Fair Labor Standards Act in the District Court of the United States for the Southern District of New York, with the consent of the respondent, enjoining it from thereafter violating the child labor provisions of that Act. Counsel for the Government offered in evidence a true copy of the judgment[18] for the announced purpose of showing that the respondent had had brought to its attention directly the child labor provisions of the Fair

[18] Government Exhibit No. 6.

Labor Standards Act, similar to those of the Walsh-Healey Public Contracts Act, and particularly Hazardous Occupation Order No. 1 (Tr., p. 594). Counsel for the respondent objected to the judgment as evidence, contending that it was addressed to future violations of the Fair Labor Standards Act, with which respondent is not charged in this proceeding, and that it did not embrace the issue of knowing employment; and further, that the entry of the judgment was without contest and without prejudice or admissions (Tr., pp. 505-9). Also, counsel for the respondent offered in evidence the annual report of the Unexcelled Manufacturing Company, Inc., for the year ending December 31, 1942,[19] and the annual report of the Unexcelled Chemical Corporation for the year ending December 31, 1946,[20] to show that not a single officer or director in office in 1942, when the judgment was entered, is now in office (Tr., pp. 626-8). The decree and the objections thereto have been considered by me, along with all of the other facts and circumstances of the case, in deciding upon the recommendation that I am about to make regarding the application of the ineligible-list provisions of Section 3 of the Act.

Upon the entire record, it is

ORDERED that the respondent Unexcelled Chemical Corporation, formerly Unexcelled Manufacturing Company, Inc., pay to the United States of America the sum of $15,600 as liquidated damages resulting from the employment of underage employees in breach of the child labor stipulations of the Act, as found herein.

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[19] Respondent's Exhibit No. 2.

[20] Respondent's Exhibit No. 3.

Decision of the Hearing Examiner

RECOMMENDED that the Secretary of Labor take the necessary action to relieve the respondent from the application of the sanction provided in Section 3 of the Act.

If no petition for review is filed with the Chief Hearing Examiner within the period prescribed by the Rules of Practice, as amended, this decision shall become final upon the expiration of such period in accordance with the Rules.

CLIFFORD P. GRANT,
Hearing Examiner.

Dated at Washington, D. C.
this 25th day of February, 1949.

[fol. 45] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case No. 10,612

UNITED STATES OF AMERICA, Plaintiff-Appellant,

vs.

UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC., Defendant-Appellee

On Appeal

ORDER

Upon the motion of Grover C. Richman, Jr., United States Attorney for the District of New Jersey, and the annexed consent of counsel for the defendant-appellee and there being good cause shown for the entry of this order;

It is on this 13th day of December 1951, Ordered that the time for filing the brief of the plaintiff-appellant be and it is hereby extended to January 4, 1952.

McLaughlin, Judge.

We hereby consent to the entry of the above Order.
Lindabury, Steelman & Lafferty, Attorneys for Defendant-Appellee. By William Rowe, A Member of the Firm.

[Stamp:] Received & Filed. Dec. 13, 1951. Ida O. Creskoff, Clerk.

[fol. 46] [Endorsed:] No. 10,612. United States Court of Appeals for the Third Circuit. United States of America vs. Unexcelled Chemical Corporation, formerly Unexcelled Manufacturing Company, Inc. On Appeal. Order extending time for filing appellant's brief to January 4, 1952. Grover C. Richman, Jr., U. S. Attorney, Newark, New Jersey.

[fol. 47] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,612

UNITED STATES OF AMERICA, Appellant

v.

UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC.

On Appeal from the United States District Court for the District of New Jersey

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Argued March 18, 1952

Before McLaughlin, Staley and Hastie, Circuit Judges

OPINION OF THE COURT—Filed April 29, 1952

By STALEY, Circuit Judge:

We are asked to decide whether the two year statute of limitations provided in Section 6 of the Portal-to-Portal Act of 1947 (61 Stat. 87, 29 U.S.C.A. § 255 (Supp. 1951)) is applicable to actions by the United States to enforce the child labor provisions of the Walsh-Healey Act. We hold that the limitation period is not applicable.

The basis of this action is the knowing employment by defendant of minors in the performance of government contracts in violation of the Walsh-Healey Act, 49 Stat. 2036-2039, 41 U.S.C.A. §§ 35-45. Pursuant to Section 5 of that [fol. 48] Act, the Secretary of Labor issued a complaint on April 17, 1947, charging defendant with numerous child-labor violations during the years 1942-1945. After a hearing, as provided by statute, the hearing examiner rendered a decision on February 25, 1949, in which he found that defendant had wrongfully employed minors for a total of 1560 days and was indebted to the United States in the sum of $15,600 as liquidated damages. In January 1950, the Attorney General instituted this action by a complaint filed in the District Court of the District of New Jersey. Upon motions

for summary judgment by both parties, the district court held the action barred by the two year limitation period of Section 6 of the Portal-to-Portal Act.[1]

Section 6 of the Portal-to-Portal Act reads as follows:

> "Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or *liquidated damages*, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—
>
> "(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;
>
> "(b) if the cause of action accrued prior to May 14, 1947—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods * * *" 61 Stat 87, 29 U.S.C.A. § 255 (Supp. 1951; emphasis supplied.)

[fol. 49] The crucial issue before us is one of statutory construction: Does the term "liquidated damages" as used in the above section refer to liquidated damages generally or merely to liquidated damages in connection with unpaid minimum wages and unpaid overtime compensation? Our study of the Portal-to-Portal Act in its entirety and its legislative history has convinced us that the clearly manifested intent of Congress was to place a limitation period only on actions for unpaid minimum wages and unpaid overtime compensation and (when permitted by law) any sums recoverable as liquidated damages in such actions. To interpret Section 6 as comprehending suits for liquidated damages by the Attorney General to enforce the

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[1] United States v. Unexcelled Chemical Corp., 99 F. Supp. 155 (D.C. N.J., 1951).

child labor provisions of the Walsh-Healey Act would, in our opinion, radically distort the intent of Congress.

The Walsh-Healey Act of 1936 was enacted to harness the leverage effect of the government's immense purchasing power in the interest of higher labor standards. Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507 (1943). Section 1 of the Act provides that certain representations and stipulations must be included in all contracts with the government for "the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000." The contractor must agree that all persons employed in the performance of the contract be paid not less than minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed in similar work in the same locality. No more than 8 hours of work a day or 40 hours a week are permitted, subject to certain exceptions. And, more pertinent to our problem here, the employment of boys under 16 and girls under 18 is prohibited. Section 2 of the Act fixes the liability for any breach of the stipulations and representations of the contract and authorizes the Attorney General to institute suits for damages. Violation of the child labor provisions renders the contractor liable in liquidated damages to the United States in the sum of $10 a day [fol. 50] for each minor wrongfully employed. Breach of the minimum wage and maximum hour stipulations renders the contractor liable for the amount of the underpayment due the employee, which sums are held in a special deposit account by the Secretary of Labor to be paid directly to the underpaid employees. The $10 a day in liquidated damages for the wrongful employment of a minor, however, does not inure even indirectly to the benefit of the minor, and is thus realistically a penalty imposed by the United States to enforce the compelling public interest in safeguarding the health of our children.

Two years after the Walsh-Healey Act was passed, Congress enacted the Fair Labor Standards Act, 52 Stat. 1060-1069, 29 U.S.C.A. §§ 201-219, which, *inter alia*, fixes minimum wage rates and maximum hours for employees engaged in commerce or in the production of goods for com-

merce,[2] and prohibits shipments in interstate commerce of goods produced in an establishment where oppressive child labor has been employed.[3] The United States is empowered to enforce the provisions of the Act by criminal prosecutions for willful violations[4] and by seeking injunctive relief.[5] In the case of violations of the minimum wage and overtime provisions, the employee is granted the right to recover from his employer the amount of the underpayment plus an additional equal amount as liquidated damages.[6] But no analogous right is given to minors employed in violation of the child labor provisions, which are enforceable solely by the United States.

The Portal-to-Portal Act of 1947 was a manifestation of Congressional reaction[7] to the decision of the Supreme Court in Anderson v. Mt. Clemens Pottery, 328 U.S. 680 [fol. 51] (1946). The Court there held that time spent by employees walking to work on the employer's premises and time engaged in certain preliminary activities should be included in the compensable workweek, subject to the possible application of the *de minimis* rule. Section 1 of the Portal-to-Portal Acts sets forth at length the findings of Congress and a declaration of policy. The pertinent portion of this Section is as follows:

> "(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpreta-

[2] 52 Stat. 1062-1064, 29 U.S.C.A. §§ 206-208.
[3] 52 Stat. 1067, 29 U.S.C.A. § 212.
[4] 52 Stat. 1069, 29 U.S.C.A. § 216 (a).
[5] 52 Stat. 1069, 29 U.S.C.A. § 217.
[6] 52 Stat. 1069, 29 U.S.C.A. § 216 (b).
[7] See § 1 of the Act, 61 Stat. 84, 29 U.S.C.A. § 251 (Supp. 1951) and House Rep. #71, 80th Cong., 1st Sess., U.S. Code Cong. Serv. 1947, pp. 1029, 1030.

tions were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others * * *; (4) employees would receive windfall payments, *including liquidated damages*, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; * * *

"The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

"The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (*except as to liability for liquidated damages*) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the na- [fol. 52] tional public interest * * * that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act." 29 U.S.C.A. § 251 (Supp. 1951). (Italics supplied.)

The findings contain not a word about the child labor provisions of either the Fair Labor Standards Act or the Walsh-Healey Act. The committee reports and the debates in both houses are equally silent on the subject. The term "liquidated damages" is first used in subsection (a) (4) of section 1, which is reproduced above. By this statement in the findings and declaration of policy, Congress thus initially makes it clear that the "liquidated damages" with which it is concerned are those recoverable in suits under the Fair Labor Standards Act for unpaid minimum wages and overtime compensation. Later in its findings, Congress declares that the same dangers which have arisen under the Fair Labor Standards Act "may (*except as to liability for liquidated damages*) arise with respect to the Walsh-Healey and Bacon-Davis Acts." This is a clear recognition by Congress that the minimum wage and maximum hours provisions of the Walsh-Healey Act do not allow re-

covery for an additional sum as liquidated damages. But how do we reconcile the parenthetical statement with the provision in the Walsh-Healey Act fixing $10 a day in liquidated damages for child labor violations? Either the parenthetical statement must be dismissed as baldly erroneous or we must conclude that the child labor provisions of the Walsh-Healey Act were completely beyond the scope of the Portal-to-Portal Act. Every manifestation of Congressional intent points unerringly toward the latter interpretation. The Act itself is the best evidence. Other uses of the term "liquidated damages" in the Act are consistent with a limited scope. Sections 3(b) and 11, 29 U.S.C.A. §§ 253 (b) and 260 (Supp. 1951), refer only to liquidated damages under the Fair Labor Standards Act.[8] Even more [fol. 53] revealing is an analysis of the sections which do not specifically employ the term. Sections 9 and 10 are particularly illuminating for, like the limitation of action section, they are broad provisions which go beyond the narrow problem of portal-to-portal suits. The pertinent part of Section 9 is as follows:

> "In any action or proceeding commenced prior to or on or after May 14, 1947 based on any act or omis-

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[8] *Cf.* the use of the term "liquidated damages" in § 2 (e), 29 U.S.C.A. § 252 (e) (Supp. 1951): "No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to May 14, 1947, or any interest in such cause of action, shall hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b) of this section." This subsection can have no possible application to actions by the United States. But even were we to assume some applicability to actions by the United States under the Walsh-Healey Act, "liquidated damages" must necessarily be interpreted to refer only to liquidated damages in connection with actions for unpaid minimum wages and unpaid overtime compensation under the Fair Labor Standards Act.

sion prior to May 14, 1947, *no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation* under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States * * *." 29 U.S.C.A. § 258 (Supp. 1951). (Emphasis supplied.)

Section 10 is a similar provision for acts or omissions subsequent to May 14, 1947. The effect of these sections is to make good faith reliance on administrative rulings a defense both in civil actions and in criminal prosecutions in which the gravamen of the action is the employer's failure to pay minimum wages or overtime compensation.[9] Although the term "liquidated damages" is not specifically mentioned, liability for liquidated damages under the Fair [fol. 54] Labor Standards Act is clearly included within the purview of these sections since such liability is derived from the "failure of the employer to pay minimum wages or overtime compensation." But broad as these sections are, they are limited to the area of minimum wages and maximum hours, and do not even purport to relate to violations of the child labor provisions of either the Fair Labor Standards Act or the Walsh-Healey Act. Sections 9 and 10 thus represent convincing evidence of the intended scope of the Portal-to-Portal Act.

Inclusion of the Walsh-Healey and Bacon-Davis Acts in the Portal-to-Portal Act was sharply attacked by several Senators on the floor of the Senate.[10] Senator Donnell, who was chairman of the sub-committee which considered the bill and who guided the legislation through the Senate, stated in reply that these two Acts were included to make

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[9] See Statement of House Managers, House Rep. #326, p. 15.

[10] See 93 Cong. Rec. 2247, 2250-2255, 2288-2289, 2352-2353, 2355, 2358.

certain that they would not be utilized to circumvent the amendments to the Fair Labor Standards Act.[11] He feared that employees whose actions under the Fair Labor Standards Act were frustrated by the amendments then enacted would demand that the government institute actions for their benefit under the Walsh-Healey Act. The Walsh-Healey and Bacon-Davis Acts were thus included in the Portal-to-Portal Act to prevent flanking attacks designed to nullify the effect of the amendments to the Fair Labor Standards Act. Section 1 of the Portal-to-Portal Act similarly manifests this intent in stating that the same evils resulting from the interpretation of the Fair Labor Standards Act "may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis * * *."[12] The Fair Labor Standards Act [fol. 55] was the absorbing concern of Congress. Having decided to make modifications in that Act, Congress then merely made corresponding changes in the Walsh-Healey and Bacon-Davis Acts. Since the Portal-to-Portal Act in no way amends the child labor provisions of the Fair Labor Standards Act, the amendments to the Walsh-Healey Act must be similarly limited.[13]

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[11] See 93 Cong. Rec. p. 2363.

[12] See also Report of the House Committee on the Judiciary, Rep. #71, 80th Cong., 1st Sess., U.S. Cong. Serv. 1947, pp. 1029, 1033: "The Walsh-Healey Act also concerns itself in its field with minimum wages and overtime compensation. The Bacon-Davis Act has provisions relating to minimum wages and other conditions of employment. These two acts are therefore affected by the Mount Clemens decision. The situation described herein as to the Fair Labor Standards Act applies to that existing under the Walsh-Healey Act and the Bacon-Davis Act. The same necessity exists there for remedial legislation."

[13] The scope of the limitation of action provision was apparent to those who guided the bill through Congress. Note the following statements by Representative Gwynne and Senator Wiley. Representative Gwynne: "Let us bear in mind that this limitation applies *only to* statutory actions, which seek to recover not only minimum wages or the over-

A study of the legislative history of the Portal-to-Portal Act makes our conclusion even more compelling. The following are portions of the bill (H.R. 2157, as amended) originally passed by the Senate:[14]

"The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (*except as to liability for attorney's fees and, in the case of the Bacon-Davis Act, for liquidated damages*) arise with respect to the Walsh-Healey and Bacon-Davis Acts * * *.

"Section 9. Limitations: The Fair Labor Standards Act of 1938, as amended, is further amended by adding at the end of Section 16 the following new subsection:

"'(c) (1) Every claim under this act for unpaid minimum wages, unpaid overtime compensation, or an additional amount as liquidated dam- [fol. 56] ages, * * * shall be forever barred unless, within 2 years after such claim accrued, suit to enforce such claim is commenced * * *.'

"(b) (1) Every claim under the Walsh-Healey Act or the Bacon-Davis Act or [*sic*] *unpaid minimum wages or unpaid overtime compensation, and under the Walsh-Healey Act for an additional amount as liquidated or other damages,* * * * shall be forever barred unless, within 2 years after such claim accrued, suit

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time compensation but an additional amount as liquidated damages, and attorneys' fees and costs." 93 Cong. Rec. 1557. (Italics supplied.) Senator Wiley: "Section 9 (b) provides, similarly, a 2-year Statute of Limitations as to *such wage claims* when they are brought under the Walsh-Healey Act or Bacon-Davis Act." 93 Cong. Rec. 2086. (Italics supplied.) Representative Gwynne introduced H.R. 2157 and was one of the House Managers. Senator Wiley was chairman of the Senate Judiciary Committee to which H.R. 2157 was referred.

[14] The text of this bill is set forth in full at 93 Cong. Rec. 2375-2377.

to enforce such claim is commenced * * *." (Emphasis supplied.)

An examination of the portions of the Senate bill cited above reveals that the bill was based on a misconception, viz., that in actions for unpaid minimum wages and overtime compensation under the Walsh-Healey Act, an additional amount is recoverable as liquidated damages. The error was apparently discovered by the conference committee, which proceeded to make two changes in the bill. First, the parenthetical statement in Section 1 was changed to the version enacted into law. The committee thus recognized that neither the Bacon-Davis Act nor the Walsh-Healey Act allowed recovery of additional sums as liquidated damages in connection with suits for minimum wages and overtime compensation. The clause prescribing a limitation period for claims under the Walsh-Healey Act likewise had to be altered. In making the change, the conference committee merely combined the limitation of action provisions relating to all three acts and simplified the language. In so doing, the present Section 6 was created. Under the limitation provision as originally passed by the Senate, the present action for wrongful employment of minors would not be barred since the reference to "liquidated and other damages" clearly relates to actions for unpaid minimum wages and overtime compensation. The same result was intended to flow from Section 6 of the Portal-to-Portal Act as enacted.

[fol. 57] In so construing the Portal-to-Portal Act, we are fully cognizant of the fact that the Courts of Appeals for the Fourth and Fifth Circuits have reached the opposite conclusion. See United States v. Lovknit Mfg. Co., 189 F. 2d 454 (C. A. 5, 1951) cert. denied 342 U. S. 896; United States v. Lance, 190 F. 2d 204 (C. A. 4, 1951) cert. denied 342 U. S. 896. We do note, however, that the violations complained of in the Lovknit case comprised not only the wrongful employment of minors but also the failure to pay proper overtime compensation. The construction of Section 6 of the Portal-to-Portal Act here adopted apparently was not advanced in either of the above cases, the government contending that Section 6 does not apply to any action by the

United States. If the construction we are adopting had been urged before those courts, different results might have ensued. With all due respect to our brethren of the Fourth and Fifth Circuits, we conclude that actions by the United States to enforce the child labor provisions of the Walsh-Healey Act are not barred by the two-year limitation period of the Portal-to-Portal Act.

The judgment of the district court will be reversed. The cause will be remanded to the district court for further proceedings not inconsistent with this opinion.

A true Copy:

Teste:

——, ——, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 58] [Stamp:] Received & Filed April 29, 1952, Ida O. Creskoff, Clerk.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,612

UNITED STATES OF AMERICA, Appellant,

vs.

UNEXCELLED CHEMICAL CORPORATION, formerly UNEXCELLED MANUFACTURING COMPANY, INC.

On Appeal from the United States District Court for the District of New Jersey

Present: McLaughlin, Staley and Hastie, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court in this case be, and the same is hereby reversed. The cause is remanded to the District Court for further proceedings not inconsistent with the opinion of this court.

Attest: Ida O. Creskoff, Clerk.

April 29, 1952.

[fol. 59] [Stamp:] Received & Filed May 22, 1952. Ida O. Creskoff, Clerk

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable, the Judges of the United States District Court for the District of New Jersey, Greeting:

Whereas, lately in the United States District Court for the District of New Jersey, before you or some of you, in a cause between United States of America, Plaintiff, (Appellant) and Unexcelled Chemical Corporation, formerly Unexcelled Manufacturing Company, Inc.,—Civil Action No. 87-50—a judgment was entered in the District Court on June 29, 1951, which judgment is of record in the office of the clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by United States of America agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed. The cause is remanded to the District Court for further proceedings not inconsistent with the opinion of this court.

April 29, 1952.

[fol. 60] You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to

right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 22nd day of May in the year of our Lord one thousand nine hundred and fifty-two.

Ida O. Creskoff, Clerk, United States Court of Appeals for the Third Circuit.

[Endorsed:] Civil Action No. 87-50. No. 10,612. United States of America, Appellant, vs. Unexcelled Chemical Corporation, formerly Unexcelled Manufacturing Company, Inc. Copy. Mandate. Received & Filed May 22, 1952. Ida O. Creskoff, Clerk.

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] Supreme Court of the United States, October Term, 1952.

No. —

Unexcelled Chemical Corporation, Formerly Unexcelled Manufacturing Company, Inc., Petitioner,

vs.

United States of America

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 26th, 1952.

Tom C. Clark, Associate Justice of the Supreme Court of the United States.

Dated this 22nd day of July, 1952.

[fol. 63] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 27, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. This case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 293

UNEXCELLED CHEMICAL CORPORATION FORMERLY UNEXCELLED MANUFACTURING COMPANY, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

GEORGE MORRIS FAY,
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912 Washington Bldg.,
Washington, D. C.,
Counsel for Petitioner.

EDWARD L. CAREY,
Washington, D. C.,
Of Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

UNEXCELLED CHEMICAL CORPORATION, FORMERLY UNEXCELLED MANUFACTURING COMPANY, INC., *Petitioner,*

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner and the appellee below, Unexcelled Chemical Corporation, formerly Unexcelled Manufacturing Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on April 29, 1952.

Opinions Below

The opinion of the district court (R. 13-16) is reported at 99 F. Supp. 155. The opinion of the court of appeals (R. 46-56) is reported at 196 F. 2d 264.

Jurisdiction

The judgment of the court of appeals was entered on April 29, 1952. On July 22, 1952, the time for filing the

petition for a writ of certiorari was extended, by order of Mr. Justice Clark, to and including August 26, 1952 (R. 58). The jurisdiction of this Court was invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the two year statute of limitations provided in Section 6 of the Portal-to-Portal Act of 1947 is applicable to actions by the United States under the Walsh-Healey Public Contracts Act.

2. Whether, if applicable to an action by the United States for liquidated damages under the Walsh-Healey Act, the statute of limitations begins to run only after an administrative proceeding before the Department of Labor is terminated, or whether it begins to run upon the employment of minors prohibited by said Act.

Statutes Involved

The pertinent provisions of the Portal-to-Portal Act and the Walsh-Healey Public Contracts Act are set forth in the Appendix, *infra*, pp. 11-16.

Statement

This action was instituted by the filing of a complaint by the Attorney General of the United States on January 27, 1950, seeking the recovery of the sum of $15,600.00 as "liquidated damages" together with interest and costs (R. 1-4). The action was brought under the Act of June 30, 1936, 49 Stat. 2036; 41 U. S. C. 35-45, known as the Walsh-Healey Act, which provides that any contract entered into by any agency of the United States for the manufacture or furnishing of materials, supplies or equipment in an amount

exceeding $10,000.00 shall contain certain stipulations, only two of which are pertinent, namely:

(a) That in the manufacture of the goods in question the provisions of the so-called Wage and Hour Law would be complied with, and

(b) That in the manufacture of the goods in question the so-called Child Labor Law would be complied with.

Section 36 of the Walsh-Healey Act provides that any breach or violation of such representation and stipulation shall render the party responsible therefor liable to the United States of America for liquidated damages in the sum of $10.00 per day for each male person under sixteen years of age and each female person under eighteen years of age knowingly employed in the performance of the contract.

The action was based on a decision of a Hearing Examiner of the Wage and Hour and Public Contract Divisions of the United States Department of Labor designated by the Secretary of Labor pursuant to 41 U. S. C. 39. The Hearing Examiner found and determined that during the years 1942 to 1945, inclusive, the defendant-appellee had knowingly employed certain named minors in the performance of Government contracts for a total of 1,560 days contrary to the provisions of said contracts. Said decision was rendered on February 25, 1949 (R. 22-44).

The answer denies that any sum is due the United States, and sets up two affirmative defenses (R. 5-6),

(1) That the defendant did not knowingly employ such minor persons, and that the finding to the contrary by the Labor Department Examiner is not supported by the preponderance of the evidence, and

(2) That the alleged wrongful employment of minors occurred more than two years prior to the commencement of the action, citing Par. 6, 61 Stat. 87, 29 U. S. C. 255—(The Portal-to-Portal Act).

Both parties moved for summary judgment on the pleadings and the record of the administrative proceedings conducted by the Department of Labor (R. 8-9 and 11-12).

The United States District Court for the District of New Jersey granted the motion of the defendant-appellee holding that this action was barred by the two-year period of limitations prescribed by the Portal-to-Portal Act, 29 U. S. C. 255 (R. 13-16). Consequently, it awarded judgment in favor of the defendant, *Unexcelled Chemical Corporation, formerly Unexcelled Manufacturing Company, Inc.* (R. 17-18).

The court of appeals reversed (R. 56-57). It held that actions by the United States to enforce child labor provisions of the Walsh-Healey Act are not barred by the two-year limitation of the Portal-to-Portal Act (R. 46-56).

Reasons for Granting the Writ

The petitioner submits that a writ of certiorari should be granted in this case under Subdivision 5 (b) of Rule 38 of this Honorable Court because the United States Court of Appeals for the Third Circuit has rendered a decision in conflict with the decisions of the United States Courts of Appeals for the Fourth and Fifth Circuits on the same question. In the instant case the United States Court of Appeals for the Third Circuit has held that actions by the United States to enforce the child labor provisions of the Walsh-Healey Act are not barred by the two-year limitation period of the Portal-to-Portal Act. This holding is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit, in the case of the *United States of America* v. *Lovknit Manufacturing Co., Inc., et al.*, 189 F. 2d 454, certiorari denied, 342 U. S. 896, Pet. for rehearing denied, 342 U. S. 915. In that case the Court held that the cause of action accrued not upon the findings of the administrative agency, but rather upon the alleged wrongful employment of minors and that the action was therefore barred by the

statute of limitations. Shortly thereafter the United States Court of Appeals for the Fourth Circuit, in the case of *United States of America* v. *Lance, Incorporated*, 190 F. 2d 204, certiorari denied, 342 U. S. 896, Pet. for rehearing denied, 342 U. S. 915, in reliance on the decision of the Court of Appeals for the Fifth Circuit in the *Lovknit* case, made a similar interpretation and held that the action was barred.

1. The United States Court of Appeals for the Third Circuit in holding that actions by the United States, to enforce the child labor provisions of the Walsh-Healey Act, are not barred by the two-year limitation period of the Portal-to-Portal Act reasoned as follows:

> "In so construing the Portal-to-Portal Act, we are fully cognizant of the fact that the Courts of Appeals for the Fourth and Fifth Circuits have reached the opposite conclusion. See United States v. Lovknit Mfg. Co., 189 F. 2d 454 (C. A. 5, 1951) cert. denied 342 U. S. 896; United States v. Lance, 190 F. 2d 204 (C. A. 4, 1951) cert. denied 342 U. S. 896. We do note, however, that the violations complained of in the Lovknit case comprised not only the wrongful employment of minors but also the failure to pay proper overtime compensation. The construction of Section 6 of the Portal-to-Portal Act here adopted apparently was not advanced in either of the above cases, the government contending that Section 6 does not apply to any action by the United States. If the construction we are adopting had been urged before those courts, different results might have ensued. With all due respect to our brethren of the Fourth and Fifth Circuits, we conclude that actions by the United States to enforce the child labor provisions of the Walsh-Healey Act are not barred by the two-year limitation period of the Portal-to-Portal Act."

The record discloses that in the *Lance* case the Government devoted a portion of its brief, in the United States Court of Appeals for the Fourth Circuit, (C. A. 4 Gov. brief, Case No. 6263 pp. 20-22) to the construction of Section 6

of the Portal-to-Portal Act and set forth at length its views that Section 6 of the Portal-to-Portal Act could not be read without reference to Section 1 (a) of the same act. Accordingly, it appears that the construction of Section 6 of the Portal-to-Portal Act as adopted by the United States Court of Appeals for the Third Circuit was presented to the United States Court of Appeals for the Fourth Circuit.

Similarly, in the *Lovknit* case (C. A. 5-Gov. brief, Case No. 13361 p. 19) the Government referred to Section 1 (a) of the Portal-to-Portal Act in support of its interpretation of Section 6. In both the *Lovknit* and *Lance* cases the Circuit Courts refused to accept the Government's contentions and held the statute of limitations applied.

On August 30, 1951, the United States filed petitions for writs of certiorari in both the *Lovknit* and *Lance* cases (Nos. 293 and 294 Oct. term, 1951). This Court denied the petitions.

It is submitted that the proper and reasonable construction of the Portal-to-Portal Act two-year limitation's period requires that it be applied to Government actions as determined by the Fourth and Fifth Circuits.

2. The authorities appear to support the position that the statute began to run at the time the minors were employed and began to work, and not from the date of the findings of the Secretary of Labor, or his representative.

In *Harp* v. *United States*, 173 F. 2d 761 (C. A. 10, 1949) certiorari denied, 338 U. S. 816, the court of appeals held that the suit was instituted less than 120 days after the enactment of the Portal-to-Portal Act, and therefore the suit was begun within the grace period fixed by Section 6 (c) of the act. However, the court went on to say:

> "It is insisted that the cause of action for liquidated damages under the Walsh-Healey Act accrues upon the breach of the contract; that the cause of action pleaded in the complaint herein accrued at the time the

several girls were employed and worked; that the cause of action was barred by limitations; and that the court erred in refusing to sustain the plea of limitations. For purposes of this case, it may be assumed without so deciding that the cause of action pleaded in the complaint accrued at the time of the employment of the girls in violation of the contract and of the Act, not upon the decision of the Secretary of Labor or his representative; and it may also be assumed without so deciding that section 6 of the Portal Act has application to an action of this kind instituted by the United States for liquidated damages under the Walsh-Healey Act . . . ."

Although the Court of Appeals for the Tenth Circuit decided the issue on the basis of the grace period provision of Section 6 of the Act, yet the court indicated by the assumptions that it made that the proper construction required the application of the limitations to the United States after the violation of the contract.

On November 5, 1951, this Court decided *McMahon* v. *United States*, 342 U. S. 2[illegible] In that case the Court construed the statute of limitations applicable to the Suits In Admiralty Act and held that the statute commenced running from the date of the injury rather than from the date of the administrative agency's disallowance of the claim.

On December 11, 1951, the Court denied the petitions for writs of certiorari to the United States Court of Appeals for the Fifth Circuit in the *Lovknit* case and to the United States Court of Appeals for the Fourth Circuit in the *Lance* case. On the same date, December 11, 1951, the Court denied the petition for rehearing in the case of *McMahon* v. *United States*, 342 U. S. 899.

On December 21, 1951, the Government filed a petition for rehearing in the *Lovknit* and *Lance* cases (Nos. 293 and 294, Oct. Term, 1951), asserting that the ruling in the *McMahon* case presented an issue quite different from the

issues in the *Lovknit* and *Lance* cases. The Government's position was that the *McMahon* decision could not be determinative of the issues in the *Lovknit* and *Lance* cases. In the latter cases the Government contended that if the statute of limitations applied to the United States then it began to run from the administrative agency's determination, whereas in the *McMahon* case the Government maintained that the statute of limitations commenced running from the date of the injury.

On January 2, 1952, in the case of *Pillsbury, et al.* v. *United Engineering Company, et al.*, 342 U. S. 197, this Court had the opportunity to construe a statute of limitations provision of the Longshoremen's and Harbor Worker's Compensation Act. There the issue was whether the limitations would begin to run after an administrative determination of the claimant's disability or from the date on which the claimant's injury occurred, and the Court held that the statute commenced to run from the date of injury. The Court declared that the petitioner's construction of permitting the statute of limitations to start at the conclusion of the administrative finding would have the effect of extending the limitations indefinitely. The Court went on to say that the provision would then be one of extension rather than limitation, and while it might be desirable for the statute to provide as petitioner contended, the power to change the statute was with Congress, not the Court.

On January 14, 1952, the Court denied the Government's petition for rehearing in the *Lovknit* and *Lance* cases.

The question of the effective date of the application of the statute of limitations in the *McMahon* and *Pillsbury* cases was before this Court at the time that the petitions for writs of certiorari were denied in the *Lovknit* and *Lance* cases.

It is submitted that the *McMahon* and *Pillsbury* cases are persuasive authority that the statute of limitations provi-

sions of the Portal-to-Portal Act should be construed to apply from the date of the violation of the contract and not from the date of the administrative agency's determination.

In the instant case the United States Court of Appeals for the Third Circuit has applied Section 6 of the Portal-to-Portal Act in such a manner as to deprive the petitioner of the benefit of the legislation which Congress enacted in the interest of setting limitations on the time in which contractors should be subject to suits for violations of the Walsh-Healey Act.

The alleged violations in the instant case occurred between November 3, 1942 and November 11, 1945 (R. 36-38). The Portal-to-Portal Act was passed on May 14, 1947, and provided that suit must be commenced within two years after the cause of action accrued or within 120 days after the enactment of the act. This suit was filed on January 27, 1950 (R. 1), more than four years after the cause of action accrued and more than two and one-half years after the alternate limitation of 120 days.

The application of Sections 6 and 6 (b and c) of the Portal-to-Portal Act, appendix, infra pp. 15-16, to the instant case is clear and free from ambiguity. Congress could not have more clearly demonstrated its intention that the statute of limitations of the Portal-to-Portal Act should apply to the liquidated damages provision of the Walsh-Healey Act. The Walsh-Healey Act provides that anyone who violates the act shall be liable to the United States of America for liquidated damages. No other liquidated damages of any kind are mentioned in the Walsh-Healey Act; therefore, when it refers to liquidated damages it could only refer to the liquidated damages for which there is liability to the United States.

The United States Court of Appeals for the Third Circuit refused to accept the clear language of Section 6 of the

Portal-to-Portal Act and read into that section certain qualifications. The qualifications are only present in Section 1 (a) of the Act which sets forth the findings of Congress and are not mentioned in the statute of limitations provisions.

The question presented to this Court is of importance to the petitioner, but it is equally important to all businesses and industries accepting contracts containing the standard provisions of the Walsh-Healey Act. In order for the petitioner and other businessmen to operate and manage their businesses efficiently and economically it is essential that a uniform ruling be promulgated concerning the application of this statute of limitations.

Conclusion

It is therefore respectfully submitted that this case is a proper one for review by certiorari in this Court and that the petition for writ of certiorari should be granted.

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APPENDIX

1. The pertinent portions of sections 1, 2, 4, 5 and 6 of the Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036, 41 U. S. C. §§ 35, 36, 38, 39) provide as follows:

Sec. 1. * * * That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

* * * * * * * * *

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week; * * *

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; * * *

* * * * * * * *

Sec. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each fe-

male person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

* * * * * * *

Sec. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act * * * and to prescribe rules and regulations with respect thereto. * * * The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

Sec. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

2. Sections 1(a) and 6 of the Portal-to-Portal Act of 1947 (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C., Supp. IV, §§ 251(a), 255) provide as follows:

Section. 1(a). The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, prac-

tices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest, and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

* * * * * * *

Sec. 6. Statute of Limitations.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

(b) if the cause of action accrued prior to the date of the enactment of this Act—may be commenced within whichever of the following periods is the shorter: (1) two years

after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless at the time commenced it is barred by an applicable State statute of limitations.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 293

UNEXCELLED CHEMICAL CORPORATION, FORMERLY UNEXCELLED MANUFACTURING COMPANY, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the district court (R. 13a-16a) is reported at 99 F. Supp. 155. The opinion of the court of appeals (R. 46-56) is reported at 196 F. 2d 264.

Jurisdiction

The judgment of the court of appeals was entered on April 29, 1952. On July 22, 1952, the time for filing the petition for a writ of certiorari was extended, by order of

Mr. Justice Clark, to and including August 26, 1952 (R. 58). The petition for a writ of certiorari was filed August 26, 1952 and was granted on October 27, 1952 (R. 59). The jurisdiction of this Court was invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether an action by the United States to recover liquidated damages provided by the Walsh-Healey Act for employment of minors on public contracts must be commenced within the period limited by Section 6 of the Portal-to-Portal Act, which provides:

> "*Statute of Limitations.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for* unpaid minimum wages, unpaid overtime compensation, or *liquidated damages, under the* Fair Labor Standards Act of 1938, as amended, the *Walsh-Healey Act,* or the Bacon-Davis Act—
>
> (a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;
>
> (b) *if the cause of action accrued prior to the date of the enactment of this Act—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued,* or (2) the period prescribed by the applicable State statute of limitations; and except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;
>
> (c) if the cause of action accrued prior to the date of the enactment of this Act—the action shall not be barred by paragraph (b) if it is commenced within one

hundred and twenty days after May 14, 1947 unless at the time commenced it is barred by an applicable State statute of limitations." Portal-to-Portal Act of May 14, 1947, c. 52, Section 6, 61 Stat. 87; 29 U. S. C. § 255 (Supp. V).

2. If the answer to Question No. 1 be "Yes," then does the time for filing an action at law to recover such liquidated damages under the Walsh-Healey Act commence to run from the date of the violation giving rise to the claim for such damages rather than from the date of the administrative determination that a violation has occurred?

Petitioner contends both questions should be answered, "Yes."

Statutes Involved

The pertinent provisions of the Portal-to-Portal Act and the Walsh-Healey Public Contracts Act are set forth in the Appendix, *infra*, pp. 22-28.

Statement

From 1942 to 1945, the United States awarded some thirty-three munitions contracts (Decision of Hearing Examiner, R. 26a-29a) to petitioner Unexcelled Chemical Corporation (formerly Unexcelled Manufacturing Corporation, Complaint, Par. III, R. 2a). On April 22, 1947, the Secretary of Labor commenced an administrative proceeding alleging that in the performance of said contracts petitioner knowingly employed boys under sixteen and girls under eighteen years of age contrary to stipulations inserted in the contracts as required by the Walsh-Healey Act, Section 1 (Hearing Examiner's Decision, R. 23a) (Complaint, Par. IV, R. 3a). Of the 3,830 workday violations alleged, the hearing examiner found that the evidence established 1,560 workday violations occurring between November 3, 1942, and November 11, 1945 (Hearing Examiner's De-

cision, R. 29a-30a, 36a-38a). All of the violations found were in the case of girls, most of whom had been referred to petitioner for employment by the United States Employment Service and who represented themselves to be of employable age. Petitioner was found at fault in accepting for employment girls who, in the opinion of the hearing examiner, had been sufficiently youthful in appearance to warn a prudent contractor as to the veracity of their representations (Hearing Examiner's Decision, R. 32a, 39a, 40a). In the case of five girls, the finding of fault was based on discrepancies between statements by the girls as to age and specific dates of birth information (Examiner's Decision, R. 40a). The decision of the hearing examiner on February 25, 1949, was that the petitioner pay $15,600 as liquidated damages and a recommendation that petitioner be relieved of the "black-listing" sanction provided in Section 3 of the Walsh-Healey Act (R. 43a-44a).

A complaint to recover $15,600 from the petitioner was filed on January 27, 1950, in the United States District Court of New Jersey by the United States Attorney for that District (R. 1a-4a). Petitioner's answer asserted two defenses (R. 5a-6a):

(1) That petitioner did not knowingly employ such minor persons and that the finding to the contrary is not supported by the preponderance of the evidence.

(2) That the alleged wrongful employment of minors set forth in the complaint occurred more than two years prior to the commencement of the action, citing Section 6 of the Portal-to-Portal Act.

Both parties moved for summary judgment on the pleadings and the record of the administrative proceedings conducted by the Department of Labor (R. 8a-9a, 11a-12a). Petitioner's motion was granted on the ground the periods of limitation prescribed by the Portal-to-Portal Act were

applicable and ran from the date of the alleged violation rather than from the date of administrative determination (R. 13a-16a). Judgment dismissing the complaint (R. 18a) was reversed by the Court of Appeals for the Third Circuit (R. 56-57). The Court of Appeals held the Portal-to-Portal Act inapplicable to actions by the United States to recover liquidated damages for the employment of minors in violation of contracts governed by the Walsh-Healey Act (R. 46-56).

Specification of Errors to Be Urged

The Court of Appeals erred:

(1) In holding that an action by the United States to recover liquidated damages for child labor violations under the Walsh-Healey Public Contracts Act need not be commenced within two years as provided by Section 6 of the Portal-to-Portal Act.

(2) In failing to affirm the district court holding that the cause of action arose at the time of the violation.

Summary of Argument

I

Respondent demands judgment against petitioner for sums which are "liquidated damages" under the Walsh-Healey Act. The last violation relied on occurred in 1945 but the action was not filed until 1950. Section 6 of the Portal-to-Portal Act provides that "Any action * * * to enforce any cause of action for * * * liquidated damages, under * * * the Walsh-Healey Act * * * shall be forever barred unless commenced within * * *" two years after the cause of action accrued. The Court of Appeals has held this much of the Portal-to-Portal Act was simply a legislative blunder and that Congress clearly

never intended to provide a statute of limitations for liquidated damage actions based on the child labor provisions of the Walsh-Healey Act. The best that can be said for this view is that it *may* be correct if the plain statutory text is ignored and emphasis placed on the absorbing concern of the legislature with the urgent portal-to-portal pay problem then confronting industry. Petitioner claims the benefit of Section 6, relying on the patent purpose of the Portal-to-Portal Act to enact a statute of limitations which would apply to actions by the United States for liquidated damages under the Walsh-Healey Act. Petitioner also relies on evidence that the House considered the general problem of limiting actions arising under federal laws and successfully pressed for amendments in Conference which resulted in the general language enacted as law in Section 6 being substituted for the restrictive language adopted by the Senate. In the face of speculation as to the legislative intent, full effect should be given the plain text, which does not conflict with other provisions nor impair any express legislative purpose.

II

If Section 6 of the Portal-to-Portal Act requires that this action be commenced within two years, then that time runs from the date of each workday violation. Respondent's contention that it does not run until termination of an administrative proceeding is utterly contrary to accepted doctrine and is unsupported by any true analogies.

Argument

I

THE LEGISLATIVE HISTORY DOES NOT CLEARLY CONTRADICT THE INTENT OF CONGRESS AS STATED IN THE STATUTORY LANGUAGE OF SECTION 6 OF THE PORTAL-TO-PORTAL ACT

There is no ambiguity or absurdity of result in the statutory language of Section 6 of the Portal to Portal Act upon which petitioner relies for a defense in this case. Only the United States may maintain actions arising under the Walsh-Healey Act, and therefore the limitations period can apply to none other than the United States. The claim asserted is for liquidated damages by the very terms of the Walsh-Healey Act. Absent ambiguity, or absurd result, no room appears for construction or resort to legislative history.

But the court below found the limitations provisions ambiguous by adverting to findings made as preambulatory statements in Section 1 which declared the serious nature of the portal-to-portal pay problem and in particular that

> "* * * (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, * * *; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; * * *"
>
> "* * * all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (*except as to liability for liquidated damages*) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest * * * that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act." Portal-to-Portal Act of 1947, § 1(a) 61 Stat.

84; 29 U. S. C. Section 251 (Supp. V). (Italics supplied.)

Finding ambiguity, resort was then had to construction and legislative history, particularly the predominant concern of Congress with the portal-to-portal pay problem, changes in successive drafts, and certain statements in debate by the managers asserting that purely cautionary motives prompted inclusion of the Walsh-Healey and Bacon-Davis Acts.

Petitioner contends that the Third Circuit Court of Appeals has deprived government contractors of beneficial legislation by errors in (1) over-emphasizing the significance of the preambulatory findings in relation to the limitations provisions and (2) slighting the original House version of H. R. 2157 in interpreting the significance of changes effected by Conference Committee action. Petitioner's discussion of the subject will not attempt to prove any clear intention of Congress to affect the instant type of litigation. It will, however, attempt to show in the legislative history, currents of purpose which discredit the conclusion that plain language can be ignored because there was clearly *no* such intention.

In Section 1 of the Portal-to-Portal Act, Congress stated at considerable length its findings as to the consequences which were developing from the application of the Fair Labor Standards Act to postliminary and preliminary activities. It also expressed a judgment as to the effect on the national economy. Among the consequences noted was that employees had suddenly and unexpectedly become entitled to "windfall" payments for activities never theretofore considered compensable, including liquidated damages, and it was stated that similar results-except as to liquidated damages might occur under the Walsh-Healey and Bacon-Davis Acts. In all this, Congress was exclu-

sively absorbed with the portal-to-portal pay problem. The reason for making such meticulous findings was immediately related to the drastic remedy which Congress was about to enact in Section 2, i. e., outlawing claims for such portal-to-portal activities by withdrawing jurisdiction from the courts, state and federal. Undoubtedly it was hoped by the legislative draftsmen that the statement of the seriousness of the problem would be considered when the constitutional validity of such legislation encountered the inevitable judicial review. Sutherland, Statutory Construction (3rd Ed., Horack) Section 4807. The constitutional question was seriously debated then, and later raised in numerous cases. Annotations, 3 A. L. R. 2d 1097, 21 A. L. R. 2d 1327. In sustaining the legislation, the elaborate findings of Section 1 were relied on to show that the Act was necessary and neither arbitrary nor unreasonable. *Battaglia* v. *General Motors Corporation* (C. A. 2, 1948) 169 F. 2d 254, cert. denied 335 U. S. 887.

But in writing a statute of limitations Congress was enacting remedies for problems broader than mere portal-to-portal pay.[1] Much of the hearings and debate concerned the desirability of a uniform statute of limitations for private wage and overtime actions. There could be no doubt as to the validity of such legislation for claims accruing subsequent to the statute. Even legislation shortening the period of limitations for existing claims has long been acknowledged as valid if a reasonable time is allowed. 34 Amer. Jur. 33, Limitation of Actions Sec. 28. The "windfall" payments discussed in Section 1 were abolished

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[1] House Report 71, 80th Cong., 1st Session, which introduced H. R. 2157 is arranged with two sections. The first was concerned with "windfall" pay problems. The second section discussing the statute of limitations was entitled "Provisions Affecting All Claims, Causes of Action and Actions under the Fair Labor Standards Act, the Walsh-Healey Act, and the Bacon-Davis Act."

by Section 2, regardless of whether such claims were brought by employees under the Fair Labor Standards or Bacon-Davis Acts or by the United States under the Walsh-Healey Act. Therefore, statements in Section 1 as to the scope of the "windfall" pay problem had no relation to Section 6, which concerned only claims outside the scope of the more serious problem discussed in Section 1. Language in Section 1 stating that the Walsh-Healey and Bacon-Davis Acts did not present a problem of "liquidated damages" must be confined to the portal-to-portal pay problem then in mind. Indeed, the finding itself says it fears "all of the results . . . aforesaid" in relation to those Acts. The "liquidated damages" visualized was an award in addition to the basic under-payment, and for such the contractor is liable directly to the employee under the Fair Labor Standards Act but not under the Walsh-Healey Act. The damages to which the contractor is liable under the Walsh-Healey Act are, however, "liquidated," not only because the Act describes them as such, but because they bear no necessary relation to an injury suffered by the promisee and plaintiff, the United States.

The only possible allusion in Section 1 to the matters regulated in Section 6 was a statement that

> "The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry." Portal-to-Portal Act of 1947, § 1(a). 61 Stat. 85; 29 U.S.C. 251(a) (Supp. V).

The court below evidently conceived the legislative thought process illuminated by this finding as coterminous with the purpose and scope of Section 6, or in other words, that the limitations enacted in Section 6 concern only such cases as

gave rise to the difficulties enumerated in the preambulatory findings of Section 1. But if Section 6 is broader in some respects than the finding, then the identity of scope is incomplete and the presumption erroneous. Again looking first to the text, it was concerned with the wake of *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680 (1946) for the evil mentioned is "potential retroactive liability." These words do not describe the basic claims subjected to limitations in Section 6. And dissimilarity in state statutes of limitation was not the whole problem, for such statutes were inapplicable to minimum wage and overtime pay claims by the United States under the Walsh-Healey Act. It can hardly be contended Congress did not intend to limit the latter actions and therefore Section 6 is broader in scope than the problem identified in the preambulatory finding. Whether it is broad enough to embrace the instant litigation is the precise problem.

The version of H. R. 2157 enacted by the Senate established limitations on Fair Labor Standards Act claims by amendment of that Act and confined the limitations to claims for minimum wages or overtime pay.[2] It enacted

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[2] "Section 9. Limitations: The Fair Labor Standards Act of 1938, as amended, is further amended by adding at the end of Section 16 the following new sub-section:

"(c)(1) Every claim under this act for unpaid minimum wages, unpaid overtime compensation, or an additional amount as liquidated damages, accruing prior to or on or after the date of enactment of the Portal-to-Portal Act of 1947, shall be forever barred unless, within two years after such claim accrued, suit to enforce such claim is commenced in a court of competent jurisdiction.

(2) Notwithstanding the provisions of paragraph (1) of this sub-section, suit to enforce any such claim accruing prior to the date of enactment of the Portal-to-Portal Act of 1947 may be commenced within 120 days after such date if such claim is not barred at the time of commencing suit by any other statute of limitations; and the period of limitation provided for in paragraph (1) of this sub-section shall not be applicable to any suit so commenced.

"(3) Any such claim, if based on portal-to-portal activities as defined in section 5 of the Portal-to-Portal Act of 1947; and any suit thereon, shall

limitations on similar claims which might be made under the Walsh-Healey and Bacon-Davis Acts. In doing so the Senate followed a pattern of particularity which had marked the course of previous Senate action touching the same subject. In comparison, House proposals had been generalized as limitations of action under federal statutes. Thus, in the 79th Congress, H. R. 2788 was introduced by Congressman Gwynne and passed the House as a general one year statute of limitations on any action under the laws of the United States.[3] House Report 1141, 79th Cong., 1st Session, in support of H. R. 2788 listed some nineteen laws affected, as to which there was said to be no period of limitations.

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be subject to the provisions of section 4 of the Portal-to-Portal Act of 1947."

(b)(1) Every claim under the Walsh-Healey Act or the Bacon-Davis Act or [sic] unpaid minimum wages or unpaid overtime compensation, and under the Walsh-Healey Act for an additional amount as liquidated or other damages, accruing prior to or on or after the date of enactment of the Portal-to-Portal Act of 1947 shall be forever barred unless, within two years after such claim accrued, suit to enforce such claim is commenced in a court of competent jurisdiction.

(2) Notwithstanding the provisions of paragraph 1 of this sub-section, suit to enforce any such claim accruing prior to the date of enactment of the Portal-to-Portal Act of 1947 may be commenced within 120 days after such date; and the period of limitation provided for in paragraph (1) of this sub-section shall not be applicable to any suit so commenced.

(3) Any such claim, if based on portal-to-portal activities as defined in section 5 of the Portal-to-Portal Act of 1947, and any suit thereon shall be subject to the provisions of section 4 of the Portal-to-Portal Act of 1947." (Text as taken from 93 Cong. Record 2376-7.)

[3] As introduced, H. R. 2788 read: "Be it enacted, * * * That Title 28 of the United States Code, as amended, be further amended by adding a new section to be known as section 793, and to read as follows: "Sec. 793. Except as otherwise provided in any act creating a right of action to recover damages, actual or exemplary, no action under the laws of the United States shall be maintained unless the same is commenced within one year after such cause of action accrued, unless a shorter time be fixed in any applicable State statute. Provided, however, that public actions to recover money damages may be enforced if brought within two years after the cause of action accrued except when the United States is not the real party in interest. Provided further, that the person liable for such damages, shall within the same period, be found within the United States so that proper process thereof may be instituted and served against such person." Text as printed in 91 Cong. Record 2927.

Many provided for actions by the United States, and the report specifically listed the Walsh-Healey Act.[4] Protests as to the effect of the bill on actions by the United States were received from the Attorney General,[5] and similar protests were made in debate. As a result, H. R. 2788 was amended prior to passage in the House by adding the words: ". . . except actions brought by the United States as the real party in interest." In the Senate, the number of the bill was retained but the language after the enacting clause entirely replaced by substituting limitations on claims for minimum wage and overtime pay which might arise under the Fair Labor Standards and Walsh-Healey Acts. These limitations were enacted as amendments to those Acts.[6]

Similarly, in the 80th Congress, the House enacted legislation establishing limitations in general language. H. R. 2157, as enacted by the House[7] provided as follows:

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[4] House Report 1141, 79th Cong., 1st Session, which chiefly discussed the problems resulting in the wake of *Anderson* v. *Mount Clemens Pottery Company*, 328 U.S. 680 (1946), contained the following statement: "This bill would affect only causes of action for the recovery of wages, penalties, or other damages pursuant to any law of the United States, and for which a specific statute of limitations is not provided. It would affect only the following causes of action: * * * 13. Suits by the United States for liquidated damages based on failure of any contractor to comply with terms of contract as to wages, hours, etc. (41 U.S.C. sec. 36)." That the "et cetera" abbreviation is meant to embrace the child labor penalty provisions can be seen by reverting to the statement made to the House by Congressman Gwynne in support of the bill he introduced. He read to the House excerpts from a number of statutes. The only excerpt which he read from the Walsh-Healey Act was Section 1(d), 41 U.S.C. sec. 35(d), relating to stipulations against employment of child labor and the penalties for breach. He noted that there was no limitation at all on public actions under the Walsh-Healey Act. (91 Cong. Record 2928).

[5] A letter from the Attorney General is appended to House Report 1141.

[6] This legislation did not get as far as Conference Committee action in the 79th Congress.

[7] H. R. 2157 was introduced by Congressman Gwynne on Feb. 24, 1947. (House Journal, 80th Cong., 1st session, p. 151). Its genesis, according to Congressman Michener (93 Cong. Rec. 1489), was in H. R. 584, introduced by Congressman Gwynne on January 7, 1947. (House Journal, p. 36) The text of H. R. 584 (Hearings, House Judiciary Committee, Sub-committee No. 2, Feb. 3-10, 1947, pp. 1-4) shows the scope was identical with H. R. 2157 and the language nearly so.

"Sec. 2. Every claim, cause of action, and action for the recovery of wages, overtime compensation, penalties, or damages (actual, liquidated or compensatory) pursuant to any law of the United States mentioned in section 5 hereof shall be subject to the following limitations and conditions:

(a) Hereafter no such action shall be maintained unless the same is commenced within one year after such cause of action accrued."

Section 5 limited its application to the Fair Labor Standards, Walsh-Healey and Bacon-Davis Acts. The House was told by Congressman Hobbs:

"The Gwynne bill last year brought up the point that there were 19 civil laws providing civil penalties no one of which had any limitation, no derailing switch, and therefore we provided one, which met with the almost unanimous approval of the House. We are trying to do the same thing today." (93 Cong. Rec. 1560)

The "Gwynne bill" here referred to was H. R. 2788, 79th Congress, supra page twelve, note three. H. R. 2157, supra, was never subjected in the House to amendment such as that imposed in the 79th Congress on H. R. 2788 excepting actions by the United States as real party in interest, although concern was expressed in the hearings for the interests of the United States when suing on its own account (Hearings on H. R. 2157, House Committee on the Judiciary, Feb. 3-10, 1947. Page 385). Perhaps this was because it was limited to specific statutes, unlike the universality of H. R. 2788, 79th Congress.[8]

[8] A suggestion that the desirability of an exception for the United States might well depend on the scope of the legislation appears in this excerpt from testimony before the House Judiciary Committee: "Mr. Robison: Mr. Smith (Milton Smith, Assistant General Counsel, Chamber of Commerce, who urged a one year limitation period), would you object to a provision that the United States would be excepted on the matter of limitations?"

"Mr. Smith: Of course, that would depend on whether the committee

In the Senate, H. R. 2157 was referred to the Judiciary Committee and reported out with amendments which struck everything after the enacting clause and substituted entirely different language. Sec. 9 amended Sec. 16 of the Fair Labor Standards Act so as to establish a two year limitation on

> "claims for unpaid minimum wages, unpaid overtime compensation, or an additional amount as liquidated damages."

It also provided a two year limitation on

> "every claim under the Walsh-Healey Act or the Bacon-Davis Act for unpaid minimum wages or unpaid overtime compensation, and under the Walsh-Healey Act for an additional amount as liquidated damages or other damages. . . ."

The ultimate language of the law, present Section 6, was the result of Conference Committee action. The court below read it as though still restricted by the specific language of the version passed by the Senate which mentioned only claims for minimum wage or overtime pay. This emphasis slights the insistence of the House on its own language (House Journal, 80th Congress, 1st session, p. 221). The genealogy of Section 6 is impressed more nearly with the likeness of the original House version, speaking in general terms of limitations on all actions, than

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decided to recommend a broad statute of limitations applicable to all types of action arising under the Federal law or whether it enacted a limitation applicable only on matters arising under the Fair Labor Standards Act. Possibly it might decide to enact one limited to only a limited class or type of cases. The degree of desirability of the exception for the United States would be related to the character of the statute that was finally imposed in the legislation. If it were a broad general statute of limitations applicable to all types of actions arising under federal law, it doubtless would be necessary to provide some exemptions in the case of actions brought by the United States Government." (Hearings on H. R. 2157, House Committee on Judiciary, Feb. 3-10, 1947, page 17.)

with the carefully selected types of claims which characterized all Senate proposals on the same subject.[9]

If the burden of proof were on petitioner to show, aside from the language of Section 6, that Congress intended to establish a two year period of limitations on the instant type of litigation, it could not prevail. The legislative history adverted to is indeed a quagmire of speculation when the plain text of the statute is cast aside in a search for some subjective legislative intent. Petitioner does, however, contend that a thread of purpose to legislate as to all actions for damages arising under these three statutes can be detected and feels that there should not be a departure from the language of Section 6 which appears to establish clear criteria for counselling and conducting litigation.

II

THE STATUTE OF LIMITATIONS COMMENCES TO RUN FROM THE DATE OF THE VIOLATION GIVING RISE TO THE CLAIM FOR DAMAGES

The opinion of the district court assumed without discussion that Section 6 of the Portal-to-Portal Act applied and discussed only whether the period of limitations ran from the date of the violations or the date of the administrative determination. It noted district court holdings that while the Portal-to-Portal Act did apply, it ran from the latter event. *United States* v. *Craddock-Terry Shoe Corporation* (D. C. W. D. Va. 1949) 84 F. Supp. 842, affirmed on other grounds, 178 F. 2d 760; *United States* v. *Hudgins-Dize Co.* (D. C. E. D. Va. 1949) 83 F. Supp. 593, 597; *United States* v. *Lance, Inc.* (D. C. W. D. N. C. 1951) 95 F. Supp. 327, reversed 190 F. 2d 204; *United States* v. *Sweet Briar*

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[9] Other Senate bills offered on the same subject at the same session also were narrowly specific in coverage. See S. 49, S. 154, S. 70, S. 160, 80th Congress, 1st Session.

(D. C. W. D. S. C. 1950) 92 F. Supp. 777, 781. Judge Meaney, in his opinion, filed June 22, 1951, was persuaded that the violation was the event which commenced the running of the limitations period, chiefly relying on *McMahon* v. *United States* (C. A. 3, 1950) 186 F. 2d 227, subsequently affirmed 342 U. S. 25, rehearing denied 342 U. S. 899. No mention was made of *United States* v. *Lovknit Manufacturing Co., Inc., et al.*, (C. A. 5, decided June 1, 1951) 189 F. 2d 454, cert. denied 342 U. S. 896, reh. denied 342 U. S. 915, which also squarely held in accord with his own opinion. The *Lovknit* case was followed in *Lance, Inc.* v. *United States* (C. A. 4, 1951) 190 F. 2d 204, cert. denied, 342 U. S. 896, reh. denied 342 U. S. 915. The Court of Appeals for the Third Circuit reversed on the sole ground that the Portal-to-Portal Act did not apply, and did not rule on date from which limitation might run. Nevertheless, certiorari was granted without limitation of the petition which requested review of both aspects of the case.

The first point to be noticed in this connection is Section 7 of the Portal-to-Portal Act:

> "In determining when an action is commenced for the purposes of section 6, an action commenced on or after the date of enactment of this Act under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; * * *" 61 Stat. 88; 29 U. S. C. Section 256 (Supp. V).

The United States has contended that the event from which the limitations period should run is the administrative determination that a violation has occurred. The theory is apparently that the administrative determination is an element of the cause of action upon which the action at law is based. Justification is sought for this view in the provisions of the Walsh-Healey Act committing administration

of that Act to the Secretary of Labor (Sec. 4), providing for hearings and subpoena powers (Sec. 5), and giving to his findings an effect conclusive on all other agencies of the United States, including the courts "if supported by the preponderance of the evidence." The Court of Appeals for the Fifth Circuit has thought that independent evidence could be introduced to supplement such administrative findings. *United States* v. *Lovknit Manufacturing Co.*, 189 F. 2d 454, 459.

The Walsh-Healey Act provides several remedies to the Government in case of violations: Cancelling the contract, charging the cost of open market purchases or other contracts to the contractor (Sec. 2); withholding from money due on the contract (Sec. 2); suit by the Attorney General to recover sums due for violations of the contract (Sec. 2); and listing the offender as ineligible to receive any government contracts for three years (Sec. 3). The conclusive effect to be given findings of the Secretary of Labor would seem primarily important as a means of effectuating the "blacklisting" sanction in Sec. 3. The specific application of this "conclusive effect" feature to the courts is a safeguard against a court's substituting its own judgment for that of the Secretary of Labor as to who shall be permitted to do business with the government. The frame in which this might arise would be an action to enjoin a government official either from distributing or maintaining the blacklist, or from refusing to award a contract to a blacklisted contractor. Again, the reviewability of the finding might come up in a mandamus action to require the Comptroller General to certify a contractor's claim for payment without deduction for sums withheld, or in a suit by the contractor in the Court of Claims in which the United States might plead a set-off or counterclaim. It is not necessary to assume, as the respondent has contended, that the "conclusive effect"

provision is meaningless unless applied to an action at law by the United States to recover sums administratively determined to be due. Furthermore, to condition enforcement of the Act on long drawn out administrative processes would seem also to mean that the contract could not be cancelled, nor sums withheld, nor open market purchases made at the contractor's cost, until the Secretary of Labor had made an administrative determination after notice and hearing.

It is a corollary of respondent's contention that the time when the limitations period starts to run is within the choice of a party to the contract. This power was thought by the respondent to be wholly undesirable in the case of *McMahon* v. *United States, supra,* where it opposed a contention which would have enabled the injured party to postpone the running of the limitations period by delaying to file an administrative claim. It argued in that case in language apt to the instant problem:

> "Statutes of limitation are statutes of repose. Their purpose is to benefit defendants and the courts by bringing an end to litigation and by precluding the trial of an issue at a time when the evidence has become stale. It would defeat 'those practical ends which are to be served by any limitation of the time within which an action must be brought' (*Reading Co.* v. *Koons,* 271 U. S. 58, 62) if a plaintiff could prevent the statute from running by delaying to perform a condition which he and he alone can fulfil." Brief for respondents, 20. *McMahon* v. *United States,* No. 17, Oct. Term, 1951.

In the *McMahon* case, this Court held that where the Suits in Admiralty Act required suit within two years after the cause of action arose, the time was not tolled by a prohibition of action prior to administrative disallowance of certain seamen's claims. The disfavor with which the law regards indefinite postponement of the statute of limitations was

also confirmed in *Pillsbury* v. *United Engineering Company* (1952) 342 U. S. 197. In that case the Court held that the one year limitation on claims for workmen's compensation ran from the event of physical injury and not from such indefinite time as the date the injury became compensable.

Section 2 of the Walsh-Healey Act authorizes the Attorney General to institute suits to recover for violation of contracts affected and does not condition the power to act on preliminary administrative hearings. No adequate or compelling reason appears to stay the usual view that a period of limitations begins to run from the date of the last event necessary to determine liability. This was the view of the trial court in the case at bar, who said:

> "The basic legal wrong of which the Government complains herein is the employment of minors in breach of the stipulation required by statute. Such a breach immediately rendered the contractor liable to the Government for liquidated damages."

As pointed out in the Lovknit case, supra, the respondent's claim for a right of indefinite postponement would entirely nullify the Portal-to-Portal Act limitation on Walsh-Healey claims.

Conclusion

Petitioner claims the benefit of legislation which, when plainly read, applies to the liability with which it is taxed. It is true that the portal-to-portal pay problem, threatening the economy like the Damoclean sword, was the pressing, urgent issue in the legislative mind. The actual legislation, however, encompassed broader purposes. When it intended to limit the legislation to claims and activities in the area of minimum wages and overtime pay, Congress chose appropriately precise language, as in Sections 9 and 10. So illuminated, the unmodified generality of Section 6 seems

the more significant. No purpose of the Portal-to-Portal, Walsh-Healey or Bacon-Davis Acts would be subverted by giving effect to such generality. The partial nullification effected by the Court of Appeals can be justified only by a process of reasoning which is far beyond the capacity of an ordinary person reading the statute and not likely to occur to counsel. Such an approach to statutory reading is perilously oblivious of the admonition that

> "plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco* v. *Walling*, 324 U. S. 244, 260 (1945).

The conclusion most useful and consonant with usage is therefore to give full effect to the statutory language. This requires that the judgment of the Court of Appeals be reversed, and the case remanded with directions to affirm the judgment of the trial court.

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APPENDIX

1. The pertinent portions of sections 1, 2, 3, 4, 5, and 6 of the Walsh-Healey Public Contracts Act (Act of June 30, 1936, 49 Stat. 2036, 41 U. S. C. §§ 35, 36, 37, 38, 39, and 40) provide as follows:

> SEC. 1. * * * That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:
>
> * * * * * * *
>
> (c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;
>
> (d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; * * *.
>
> * * * * * * *
>
> SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of

such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: Provided, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

* * * * * * *

SEC. 3. "The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by sections 35-45 of this title. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corpo-

ration, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred."

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act * * * and to prescribe rules and regulations with respect thereto. * * * The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as and when so ordered, and to give testimony relat-

ing to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. * * * The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected: * * *

2. The pertinent portions of the Portal-to-Portal Act of 1947 (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C. 251 *et seq.* Supp. V) provide as follows:

SEC. 1 (a). The Congress finds hereby that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital re-

sources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares

that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

* * * * * * *

SEC. 6. Statute of Limitations.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

(b) if the cause of action accrued prior to the date of the enactment of this Act—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the

period prescribed by the applicable State statute of limitations; and except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless at the time commenced it is barred by an applicable State statute of limitations.

* * * * * * *

No. 293

In the Supreme Court of the United States

OCTOBER TERM, 1952

UNEXCELLED CHEMICAL CORPORATION, FORMERLY UNEXCELLED MANUFACTURING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

I

In express and direct conflict with the decisions of the United States Courts of Appeals for the Fourth and Fifth Circuits in *Lance, Inc.* v. *United States,* 190 F. 2d 204, certiorari denied, 342 U. S. 896, rehearing denied, 342 U. S. 915, and *United States* v. *Lovknit Manufacturing Co., Inc.,* 189 F. 2d 454, certiorari denied, 342 U. S. 896, rehearing denied, 342 U. S. 915, the court below has held that the two-year statute of limitations in section 6 of the Portal-to-Portal Act of 1947 is not applicable to actions by the United States under the Walsh-Healey Public Contracts

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Act, at least where child labor violations are concerned.[1]

The substantial practical importance of the issues here raised in the administration and enforcement of the Walsh-Healey Act has already been set forth in the Government's petition for a writ of certiorari in the *Lance* case, No. 293, October Term, 1951, pp. 7–12. Those problems are now magnified by the squarely opposed holdings of the Fourth and Fifth Circuits, on the one hand, and the Third Circuit, on the other. Unless this conflict is resolved, both Government and industry will, at the least, be subjected to avoidable expenses and delays of litigation, and an unjustifiable discrimination to litigants in different jurisdictions will result.

While we regard the decision of the court below as correct, we believe the conflict among the circuits and the importance of the questions call for an authoritative decision by this Court. We do not oppose, therefore, the granting of the petition.

II

In the event that the petition is granted, we suggest that the Court may wish to vacate its previous orders denying certiorari and rehearing in the *Lance* and *Lovknit* cases, *supra*. Subsequent announcement by the Third Circuit of its disagreement with the Fourth and Fifth Circuits would

[1] The *Lance* case involved only child labor violations; *Lovknit* involved both child labor violations and failure to pay proper overtime compensation (see R. 55).

seem to provide an appropriate basis for this action. Cf. *Clark* v. *Manufacturers Trust Co.*, 337 U. S. 953, 338 U. S. 241, 242; *Stone* v. *White*, 300 U. S. 643. But an additional special ground for reviewing the *Lovknit* decision exists in the fact that it dealt with overtime as well as child labor violations whereas the present case involves only the latter. If this petition is granted, the Government will urge that the decision be affirmed on grounds which relate to wage as well as child labor violations. Moreover, piecemeal disposition of the questions at issue will serve only to postpone the day of certainty with respect to the correct administrative practice. Although the petition for rehearing in *Lance* and *Lovknit* was denied in the last term of Court, any question of the power to act because of the expiration of the term would seem to be removed by 28 U. S. C. 452, enacted in the 1948 revision of the Judicial Code. We do not suggest that, under 28 U. S. C. 452, decided cases should indefinitely remain open for reconsideration, but since the previous denial of the petition for rehearing was during the current year (less than nine months ago) we submit that it may well be appropriate for the Court to exercise its discretion to grant review here in view of the peculiar circumstances. Compare *Zap* v. *United States*, 328 U. S. 624, 329 U. S. 824, 330 U. S. 800; *Stone* v. *White*, *supra*.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

OCTOBER 1952.

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UNEXCELLED CHEMICAL CORPORATION, FORMERLY UNEXCELLED MANUFACTURING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (R. 13) is reported at 99 F. Supp. 155. The opinion of the United States Court of Appeals for the Third Circuit (R. 46) is reported at 196 F. 2d 264.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1952 (R. 56). By order of Mr. Justice Clark, dated July 22, 1952, the time for filing a petition for a writ of certiorari was extended to and including August 26, 1952 (R.

58). The petition for a writ of certiorari was filed on August 26, 1952, and was granted on October 27, 1952 (R. 59). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the limitations provisions of Section 6 of the Portal-to-Portal Act of 1947 are applicable to suits brought by the United States to collect liquidated damages for the knowing employment of minors in violation of the Walsh-Healey Public Contracts Act.

2. If Section 6 is applicable, whether a cause of action based on an administrative determination that liquidated damages are due the United States for violation of the Walsh-Healey Act accrues at the time of violation or at the date of the administrative determination upon which suit is brought.

3. If the cause of action accrues, and the period of limitation begins to run, at the time of violation of the Walsh-Healey Act, whether the issuance of the administrative complaint contemplated by the Walsh-Healey Act is the commencement of an action for the purposes of Section 6 of the Portal-to-Portal Act.

STATUTE INVOLVED

Section 6 of the Portal-to-Portal Act of 1947, 61 Stat. 84, 87, 29 U. S. C., Supp. V, 255, read as follows:

STATUTE OF LIMITATIONS.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

(b) if the cause of action accrued prior to the date of the enactment of this Act—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless at the time commenced it is barred by an applicable State statute of limitations.

The text of the Portal-to-Portal Act and the pertinent sections of the Walsh-Healey Public Contracts Act, Act of June 30, 1936, 49 Stat. 2036, as amended, 41 U. S. C. 35–45, are set forth in Appendix A, *infra,* pp. 72–92.

STATEMENT

This is an action to recover liquidated damages in the sum of $15,600, which were administratively determined to be due the United States because of petitioner's knowing employment of child labor in violation of the Walsh-Healey Public Contracts Act. The district court held the action barred by the two-year limitations provision of Section 6 of the Portal-to-Portal Act, *supra,* p. 3. (R. 17). On appeal, the judgment of the district court was reversed and the case remanded for further proceedings (R. 56). For present purposes, the facts are uncontroverted and may be summarized as follows:

On April 17, 1947, the Secretary of Labor issued a complaint pursuant to Section 5 of the Walsh-Healey Act, charging petitioner with having knowingly employed child labor during the years 1942–1945 in violation of the Act (R. 3). On April 22, 1947, administrative proceedings on the complaint were instituted (R. 23). On February 25, 1949, after completion of the hearings, the Hearing Examiner issued a decision in which he found that petitioner had knowingly

employed child labor for a total of 1,560 working days between November 3, 1942, and November 11, 1945, and was, therefore, indebted to the United States in the sum of $15,600 as liquidated damages (R. 29–30, 36–38, 43). Upon the failure of petitioner to file a petition for review with the Chief Hearing Examiner within the twenty-day period prescribed by the Rules of Practice of the Department of Labor, the decision of the Hearing Examiner ~~become~~ became final (R. 3–4).

On January 27, 1950, the Attorney General instituted this action in the United States District Court for the District of New Jersey, on the findings and decision of the Hearing Examiner (R. 1). After the filing of an answer, both parties moved for summary judgment on the pleadings and the record of the administrative proceedings conducted by the Department of Labor (R. 5, 7–12). In pertinent part, the answer alleged as a defense that the alleged wrongful employment of minors occurred more than two years prior to the commencement of suit, citing Section 6 of the Portal-to-Portal Act (R. 6).

The district court granted petitioner's motion for summary judgment and dismissed the complaint (R. 17), holding that the limitations provision in Section 6 was applicable and that it began to run from the dates of alleged violation (R. 14–16). The court of appeals reversed, hold-

ing that "actions by the United States to enforce the child labor provisions of the Walsh-Healey Act are not barred by the two-year limitation period of the Portal-to-Portal Act" (R. 56).

SUMMARY OF ARGUMENT

I

The language of Section 6 of the Portal-to-Portal Act (*supra*, p. 3) does not expressly and unequivocally refer to the United States, nor does its legislative history reveal an intention to apply the statute to the United States. In view of the principle that a statute imposing restrictions, *viz.*, a statute of limitations, does not apply to the Government unless the intention to make it apply is clearly manifested, Section 6 should not be construed to limit suits brought by the United States to enforce the provisions of the Walsh-Healey Act. This principle is particularly appropriate where, as here, the application of the limitations period to the United States would substantially vitiate the power of the United States to enforce the remedial provisions of the Walsh-Healey Act, as is its obligation.

A. The terms and structure of the Portal-to-Portal Act refute the imputation to Congress of the intention to apply Section 6 to suits by the United States.

1. With respect to the violations of the child labor provisions of the Walsh-Healey Act, the in-

tention of Congress, as manifested by the terms and structure of the Portal-to-Portal Act, is completely unequivocal. The findings of Section 1 (a), detailing the reasons Congress deemed it necessary to enact the Act, are plainly inconsistent with any intention to legislate with respect to the child labor provisions of either the Fair Labor Standards Act or the Walsh-Healey Act. Examination of the provisions of the Portal-to-Portal Act indicates further that the term "liquidated damages" in Section 6 does not comprehend suits by the Government. And other sections bear out the conclusion that Section 6 was aimed only at employee suits and not at suits by the United States to enforce the child labor provisions of the Walsh-Healey Act.

2. The terms of the Portal-to-Portal Act indicate also that Section 6 was not intended to apply to suits by the United States to enforce any provision of the Walsh-Healey Act, including the wages and hours provisions. Findings of Section 1 (a), for example, are inconsistent with any such intention, as are certain substantive provisions. The clear purpose of Section 6 was to remedy the problems arising out of the different periods of limitation under the various state laws, a consideration inapplicable to the United States on which state statutes of limitation are not controlling. Further, the other sections of the Portal-to-Portal Act which were intended to be

applicable to the United States use far more comprehensive language than that of Section 6.

B. The general legislative history of the Portal-to-Portal Act is marked by three factors: (1) The basic concern of Congress was to bar employee suits, and the legislative proceedings were almost wholly directed to this problem, and not to Government enforcement actions. (2) Congress apparently assumed that employees had a right of action under the Walsh-Healey Act. (3) Insofar as the statute of limitations was considered, the principal concern of Congress was the lack of uniformity among the state statutes of limitations.

This legislative history is consistent with the Government's contention that Section 6 was not intended to apply to any suit by the Government to enforce the provisions of the Walsh-Healey Act. With respect to child labor violations of the Walsh-Healey Act, the history makes it quite clear that those provisions are completely beyond the scope of Section 6 of the Portal-to-Portal Act.

II

Assuming *arguendo* that Section 6 was intended to apply to suits brought by the United States, the present suit was nevertheless timely filed. For the purposes of Section 6, a "cause of action accrues" only at the time that it is administratively determined by the Department of Labor, in accordance with Section 5 of the Walsh-Healey Act, that the contractor is liable to the United

States for liquidated damages for violation of the Act. In the alternative, the initiation of those administrative proceedings by the filing of the administrative complaint should be considered the commencement of an "action" for the purposes of Section 6.

A. The burden of the enforcement of the Walsh-Healey Act is upon the Secretary of Labor. *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501. The Secretary of Labor's findings as to violation, which are conclusive upon other government agencies and, if supported by a preponderance of the evidence, on the courts, are the sole legal and practical basis for suit by the Attorney General to recover the liquidated damages found due. Further, the doctrine of "primary jurisdiction," see *Far East Conference* v. *United States,* 324 U. S. 570, indicates that the administrative proceedings prescribed by the Walsh-Healey Act are an essential prerequisite to the filing of a suit in the district court.

B. A period of limitation begins to run only after all events prerequisite to suit have occurred. Inasmuch as the statutory scheme makes the administrative findings a prerequisite to court action, the cause of action of the United States cannot accrue until those findings have been made. But even if it be assumed that suit can be brought without the prior administrative determination, it would seem clear that the United

States would have (1) a cause of action which accrues immediately upon violation of the Act, whether or not such violation be known to the Government, and (2) a cause of action which accrues after administrative proceedings have resulted in the determination that liquidated damages are due the United States. The fact that one of these causes may be barred does not prevent suit from being brought on the other.

The lack of knowledge of the violations at the time they occur, the time necessarily consumed in investigation and in the administrative proceedings, and the fact that violations do not usually occur as single instances but continuously or intermittently over a period of time, all demonstrate that the possibility of devising any effective enforcement procedure within the two-year period of Section 6 is extremely remote, and lead to the conclusion that the cause of action should not be deemed to accrue until after the administrative determination. A contrary conclusion would make it virtually impossible to resort to amicable settlements and would completely disrupt, if not destroy, the system of enforcement procedure consistently followed by the Departments of Labor and Justice since the passage of the Walsh-Healey Act in 1936.

C. Assuming that the cause of action accrues when the Act is in fact violated, the initiation of administrative proceedings should be deemed the commencement of an "action" for the purposes of

Section 6. Section 7 provides that "an action is commenced for the purposes of section 6 * * * on the date when the complaint is filed." Construing Section 7 so that the action is considered commenced "on the date the complaint is filed with the Secretary of Labor" would accommodate both the statutory scheme of the Walsh-Healey Act and the assumed intention of Congress in the Portal-to-Portal Act. Such an interpretation would be consistent with the concepts of the "collaborative" and "complementary" interrelationship of the administrative and judicial processes and would avoid the incongruous and eviscerating results the contrary interpretation will produce.

ARGUMENT

I. INTRODUCTORY STATEMENT

A. THE WALSH-HEALEY ACT

The Walsh-Healey or Public Contracts Act, 49 Stat. 2036, as amended, 41 U. S. C. 35–45, was adopted in 1936. It provides that a contractor with the Government for the furnishing of materials, supplies, articles and equipment in any amount exceeding $10,000 must pay his employees minimum wages determined by the Secretary of Labor to be the prevailing minimum wages (Sec. 1 (b), 41 U. S. C. 35 (b)). It prescribes a maximum work week (Sec. 1 (c), 41 U. S. C. 35 (c)), prohibits child and convict labor (Sec. 1 (d), 41 U. S. C. 35 (d)), and requires that the

materials used be manufactured and the contract be performed under sanitary and safe working conditions (Sec. 1 (e), 41 U. S. C. 35 (e)). It further provides for overtime payments, with the permission of the Secretary of Labor, for work in excess of the maximum hours (Sec. 6, 41 U. S. C. 40).

The Act "directs the Secretary to adminster its provisions." *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 507; Sec. 4, 41 U. S. C. 38. He is empowered to make "investigations and findings" and to "prosecute any inquiry necessary to his functions" (Sec. 4). He is further authorized to hold hearings "upon his own motion" and "on complaint of a breach or violation" and "to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath" (Sec. 5, 41 U. S. C. 39). He is directed to "make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and * * * shall have the power, and is authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of the Act" (Sec. 5).

For violation of the Act, the contractor is liable to pay to the Government as liquidated

damages "the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee" (Sec. 2, 41 U. S. C. 36). Such sums of money due to the United States may be withheld from any amounts due on any such contracts "or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof" (Sec. 2). The monies withheld or recovered as deductions, rebates, refunds, or underpayment of wages—as contrasted with the monies withheld or recovered for the employment of child and convict labor—"shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay * * *: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America" (Sec. 2). For violation of the Act, the United States is authorized to cancel the contract and to make open-market purchases or to enter into other contracts for the completion of the original contract, charging any addi-

tional cost to the contractor (Sec. 2). Further, the Comptroller General is authorized and directed to distribute to all agencies of the Government a list of persons or firms found by the Secretary of Labor to have violated the Act, and no contracts are to be awarded to such persons or firms until three years after the publication of the list unless the Secretary otherwise recommends (Sec. 3, 41 U. S. C. 37). Except as to the one-year limitation upon payment to employees of sums withheld or recovered by the United States, no period of limitation is prescribed as to these several enforcement provisions.

B. THE PORTAL-TO-PORTAL ACT

Events following this Court's interpretation of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. 201, in *Anderson* v. *Mt. Clemens Pottery Co.* 328 U. S. 680, rehearing denied, 329 U. S. 822, led to the adoption of the Portal-to-Portal Act (Act of May 14, 1947, 61 Stat. 84, 29 U. S. C., Supp. V, 251–262). In that case this Court held that, giving due consideration to the *de minimis* doctrine, time necessarily spent by the employees in walking to work on the employer's premises and in preliminary activities after arriving at their places of work is working time within the scope of the Fair Labor Standards Act.

In the succeeding six months prior to the opening of the First Session of the Eightieth Congress, some 1,900 suits for so-called portal-to-portal claims under the Fair Labor Standards

Act were filed by employees in the United States district courts alone. The amounts claimed in these district court suits amounted to more than five billion dollars. H. Rep. No. 71, 80th Cong., 1st Sess., p. 3. Some of the pending suits asked for amounts which exceeded the working capital or the net worth of the firms sued. S. Rep. No. 48, 80th Cong., 1st Sess., p. 25. Congress concluded that if these suits had been successfully prosecuted, the public Treasury would probably have been deprived of large revenues in that a great number of employers would have been entitled to receive tax rebates, the Government would have been liable to reimburse its wartime cost-plus-fixed-fee contractors, and the amount of renegotiation recoveries would have been substantially reduced. S. Rep. No. 48, *supra*, pp. 32–39. In addition, it appeared that the pendency of these suits would adversely affect the conclusion of new collective bargaining agreements. S. Rep. No. 48, *supra*, pp. 39–40. Further, the impact of the problem was heightened by the fact that the Fair Labor Standards Act contained no limitation provision and the State statutory periods of limitation varied from one to eight years. S. Rep. No. 48, *supra*, pp. 42, 50.

In the opinion of Congress, "a substantial burden on commerce and a substantial obstruction to the flow of goods in commerce" had been created because "wholly unexpected liabilities, immense in amount and retroactive in operation,

upon employers" had been created, with the result that if the claims which were arising were permitted to stand (Portal-to-Portal Act, Sec. 1 (a), 29 U. S. C., Supp. V, 251):

* * * * *

> (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and

employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

* * * * * *

"To meet the existing emergency and to correct existing evils" (Sec. 1, 29 U. S. C., Supp. V., 251), Congress enacted the Portal-to-Portal Act.

The questions which this case presents focus on the effect of the two year limitations provision of Section 6 of the Portal-to-Portal Act (*supra*, p. 3) on suits brought by the United States under the Walsh-Healey Act upon the administrative determination that liquidated damages are due the United States because the employer has violated the child labor provisions of the Walsh-Healey Act. The court below, reading the Portal-to-Portal Act so as to give effect to its provisions as a harmonious whole, and construing

Section 6 in light of the purpose of Congress and the legislative history of the Act, held the two-year period of limitation inapplicable to an action for liquidated damages based on child labor violations.

II. SECTION 6 OF THE PORTAL-TO-PORTAL ACT DOES NOT APPLY TO SUITS BY THE UNITED STATES UNDER THE WALSH-HEALEY ACT

The language of Section 6 of the Portal-to-Portal Act does not expressly and unequivocally refer to the United States, nor does its legislative history reveal an undisputable intention to apply the statute to the United States. It is, of course, "a principle of public policy" "settled beyond doubt or controversy" that a statute of limitations does not apply to the Government unless the intention to make it apply is expressed or clearly manifested. *United States* v. *Nashville, C. & St. L. Ry. Co.*, 118 U. S. 120, 125. As the Court stated in that case (at p. 125):

> It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless

> Congress has clearly manifested its intention that they should be so bound. *Lindsey* v. *Miller,* 6 Pet. 666; *United States* v. *Knight,* 14 Pet. 301, 315; *Gibson* v. *Chouteau,* 13 Wall. 92; *United States* v. *Thompson,* 98 U. S. 486; *Fink* v. *O'Neil,* 106 U. S. 272, 281.

See also *Grand Trunk Western Ry. Co.* v. *United States,* 252 U. S. 112, 121; *duPont de Nemours & Co.* v. *Davis,* 264 U. S. 456, 462; *United States* v. *Whited & Wheless,* 246 U. S. 552, 561.

This is but an application of the "old and well-known rule" (*United States* v. *United Mine Workers,* 330 U. S. 258, 272–273) that "a general statute imposing restrictions does not impose them upon the Government itself without a clear expression or implication to that effect." *United States* v. *Wittek,* 337 U. S. 346, 358–369.

This principle is particularly appropriate where, as here, there is no reference in Section 6 to the United States and where the application of the limitations period to the United States would substantially eviscerate the power of the United States to enforce the remedial provisions of the statute, as is its obligation. A comprehensive review of all enforcement actions filed during the fifteen years of the Walsh-Healey Act's existence indicates that the possibility of devising any effective enforcement procedure in the face of a two-year limitations period is extremely

unlikely. Investigation by the Secretary of Labor of Government contractors (a prerequisite to suit under the statutory scheme, see pp. 42-58, *infra*) is frequently delayed of necessity until after the two years have elapsed. But even if (1) investigation results in prompt discovery of a violation, (2) the administrative hearings and inter-departmental arrangements contemplated by Sections 2 and 5 of the Act are promptly carried to conclusion, and (3) a complaint is filed within two years from the date of the last violation, the bulk of the claim may still be lost. For these claims accrue from day to day and week to week, and not upon the occurrence of a particular event. For every week, therefore, which elapses before the complaint can be filed by the Attorney General in court, one week of the two years' liability is cut off. The consequence is that so little may be left of the claim as to render the sanction of liquidated damages virtually worthless.

In this context, therefore, the application of the principle, that only where there is an unequivocal legislative intent is a statute of limitations to be deemed to restrict the Government, is peculiarly appropriate. Not only is there no express and unequivocal reference in Section 6 to suits brought by the United States, but there is no such indication in the legislative history. Examination of the policy and purposes of the Portal-to-Portal Act, as well as its terms, demon-

strates that Section 6 is directed solely to suits by employees to recover under-payments of wages and not to enforcement actions brought by the United States. More specifically, the "liquidated damages" referred to in Section 6 are those payable to employees under the Fair Labor Standards Act and not those payable to the United States under the Walsh-Healey Act. There is no clear manifestation of a Congressional intent, in the terms of the statute or its legislative history, to apply the limitations provision to the sovereign—a result which would curtail, if not eliminate, effective enforcement of the Walsh-Healey Act and which would completely alter the enforcement system established under the statutory scheme.

A. THE TERMS AND STRUCTURE OF THE PORTAL-TO-PORTAL ACT REFUTE THE IMPUTATION TO CONGRESS OF THE INTENTION TO APPLY SECTION 6 TO SUITS BY THE UNITED STATES

1. *Child Labor Violations.*—As the court below held, with respect to violations of the child labor provisions of the Walsh-Healey Act, the intention of Congress, as manifested by the terms and structure of the Portal-to-Portal Act, is completely unequivocal. As to such violations, the findings of Congress embodied in Section 1 (a) (*supra*, pp. 16–17) are entirely silent. But even more significantly, those findings are plainly inconsistent with any intention to legislate with respect to the child labor provisions of either the Fair Labor Standards Act or the Walsh-Healey Act. Thus,

Section 1 (a) declares that certain judicial interpretations of the Fair Labor Standards Act[1] were "in disregard of long-established customs, practices, and contracts * * * thereby creating wholly unexpected liabilities," that "the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others," that "employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay," and that there would be "increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee."

But the decisions "in disregard of long-established customs, practices, and contracts * * * creating wholly unexpected liabilities" had no reference whatsoever to child labor. Moreover, the Walsh-Healey Act makes no provision for payment to employees of compensation for child labor violations. Section 2 of the Walsh-Healey Act provides for the payment of liquidated damages for such violations solely to the United

[1] These interpretations would appear to include *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, rehearing denied, 329 U. S. 822; *Jewell Ridge Corp.* v. *Local No. 6167*, 325 U. S. 161; *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590; see H. Rep. No. 71, 80th Cong., 1st sess., pp. 2–4.

States (41 U. S. C. 36). Similarly, the Fair Labor Standards Act makes no provision for the payment of compensation to employees for violation of the child labor provisions of that Act. Accordingly, actions by the United States for liquidated damages under the Walsh-Healey Act for child labor violations—or criminal prosecutions under Section 16 (a) of the Fair Labor Standards Act (29 U. S. C. 216 (a)) for child labor violations—could hardly be supposed to "bring about financial ruin of many employers" and to result in "windfall payments" to employees and "increasing demands for payment to employees."

Section 1 (a) further states that as a result of certain judicial interpretations of the Fair Labor Standards Act "champertous practices would be encouraged," employees "would receive windfall payments," "the Public Treasury would be deprived of large sums of revenues," and "the cost to the Government of goods and services * * * would be unreasonably increased." Certainly suits by the United States to enforce the child labor provisions of the Walsh-Healey Act cannot encourage champertous practices, and it can scarcely be suggested that the Act sought to protect the United States against the adverse financial effects of its own suits for liquidated damages to enforce those child labor provisions. Indeed, suits for liquidated damages under the child

labor provisions of the Walsh-Healey Act increased, rather than decreased, the revenues accruing to the public Treasury.

Directly relevant also is the use of the term "liquidated damages" in Section 1 (a). The term first appears in subsection (a) (4) where it is stated that, under these interpretations of the Fair Labor Standards Act, "employees would receive windfall payments, including liquidated damages." Later in its findings in Section 1 (a), after listing the results which it found to have arisen under the Fair Labor Standards Act, Congress declares that all of those results "may (*except as to liability for liquidated damages*) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest * * * that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act" [emphasis supplied]. These findings reveal that the "liquidated damages" with which Congress was concerned were the double damages payable under the Fair Labor Standards Act only. Congress, it is submitted, expressly negatived any intention to affect liability for liquidated damage under the Walsh-Healey Act.[2] Since, as Congress was aware (see *infra*, pp. ~~111-112, 116~~ 95-97, 113-115, 117), the only remedy granted to the Government under the Walsh-Healey Act

[2] The legislative history, see pp. 93–118, *infra*, indicates the negation of any Congressional intent to affect liquidated damages under the Walsh-Healey Act.

for violations of the child labor provisions, is for liquidated damages, it must be concluded that Section 6 of the Portal-to-Portal Act applies only to possible employee suits under the Walsh-Healey Act and not to actions by the United States for such liquidated damages.[3]

The substantive provisions of the Portal-to-Portal Act inescapably confirm the conclusion we have drawn from the legislative findings. Other than the ambiguous use of the term "liquidated damages" in Section 6, there can be no question that, as used in other sections, that term has reference solely to the double damages for minimum wage and overtime violations of the Fair Labor Standards Act. Thus, Section 2 (e) (29 U. S. C., Supp. V, 252 (e)) provides that "no cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act"—language identical to that used in

[3] Indeed, if Section 6 is held to be applicable to suits brought by the United States to enforce the child labor provisions of the Walsh-Healey Act, a completely anomalous result will ensue. The child labor provisions of the Fair Labor Standards Act—the Act at which Section 6 of the Portal-to-Portal Act was clearly and directly aimed—will not be affected, inasmuch as the sanctions for those violations are criminal penalties. On the other hand, the child labor provisions of the Walsh-Healey Act—an Act which was included only because of the Congressional belief that employee suits could be brought under its terms—will be immediately and substantially affected.

Section 6—"shall hereafter be assignable." Since this provision is plainly inapplicable to the United States, and since employees are not granted the right to recover liquidated damages either under the Fair Labor Standards Act or the Walsh-Healey Act for child labor violations, it is apparent that the term "liquidated damages" in this subsection does not refer to such violations.

The term "liquidated damages" appears elsewhere only in Sections 3 (b) and 11 (29 U. S. C., Supp. V, 253 (b), 260). Section 3 (b) permits an employee to waive his right "to liquidated damages" under the Fair Labor Standards Act (cf. *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697 (1945)), and Section 11 makes the award of liquidated damages in an action under the Fair Labor Standards Act "to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages" a matter in the sound discretion of the court. Cf. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572 (1942). Since no employee is granted a cause of action under the Fair Labor Standards Act for child labor violations, it is apparent here also that the term "liquidated damages" has no reference to such violations.

Other sections of the Act, which contemplate, but do not expressly mention, "liquidated damages," corroborate the conclusion that "liquidated

damages" does not refer to Government enforcement actions.

Sections 9 and 10 (29 U. S. C., Supp. V, 258, 259) are particularly illuminating since, like Section 6, they are broad provisions which go beyond the narrow problems of claims for travel time and "preliminary" or "postliminary" activities. These sections make good faith reliance on administrative rulings a defense both in civil actions and in criminal prosecutions where the gravamen of the action is the "failure of the employer to pay minimum wages or overtime compensation" under the Fair Labor Standards Act, Walsh-Healey, and Bacon-Davis Acts. As the court below pointed out (R. 52), "although the term 'liquidated damages' is not specifically mentioned, liability for liquidated damages under the Fair Labor Standards Act is clearly included within the purview of these sections since such liability is derived from the 'failure of the employer to pay minimum wages or overtime compensation.' But broad as these sections are, they are limited to the area of minimum wages and maximum hours, and do not even purport to relate to violations of the child labor provisions of either the Fair Labor Standards Act or the Walsh-Healey Act. Sections 9 and 10 thus represent convincing evidence of the intended scope of the Portal-to-Portal Act."

Analysis of Section 12 leads to the same conclusion. With respect to the applicability of certain "area of production" regulations under the Fair Labor Standards Act, which were held invalid in *Addison* v. *Holly Hill Co.*, 322 U. S. 607, Section 12 provides that "no employer shall be subject to any liability or punishment * * * on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation * * *" (29 U. S. C., Supp. V, 261). Here again, although the term "liquidated damages" is not specifically mentioned, liability for liquidated damages is clearly included within the scope of Section 12 because such liability is derived from an employer's failure to pay "minimum wages" or "overtime compensation" under the Fair Labor Standards Act. Since Section 12 does not purport to relate to the child labor provisions of the Fair Labor Standards Act, Section 12 also furnishes persuasive evidence as to the use of the term "liquidated damages."

Equally revealing is an analysis of other sections of the Act which do not specifically or tacitly employ the term "liquidated damages." Section 2 (a) (29 U. S. C., Supp. V, 252 (a)) retroactively relieves an employer of liability or punishment under the Fair Labor Standards, Walsh-Healey, and Bacon-Davis Acts only where the employer has failed "to pay an employee mini-

mum wages, or to pay an employee overtime compensation." Section 2 (c) (29 U. S. C., Supp. V, 252 (c)) defines compensable activities only with respect to "the application of the minimum wage and overtime compensation provisions" of the Fair Labor Standards, Walsh-Healey, and Bacon-Davis Acts. And Section 2 (d) (29 U. S. C., Supp. V, 252 (d)) deprives the courts of jurisdiction to enforce liability or impose punishment only for the failure of an employer "to pay minimum wages or overtime compensation" under the Fair Labor Standards, Walsh-Healey, and Bacon-Davis Acts.

Section 4 (a) (29 U. S. C., Supp. V, 254 (a)), like Section 2, relieves an employer of liability or punishment under the Fair Labor Standards, Walsh-Healey, and Bacon-Davis Acts, only "on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation." And Section 4 (d) (29 U. S. C., Supp. V, 254 (d)), like Section 2 (c), defines compensable activities under the Fair Labor Standards, Walsh-Healey, and Bacon-Davis Acts solely with reference to "the application of the minimum wage and overtime compensation provisions."

Although Sections 3 (a), 5, 7 (a) and (b), and 8 speak broadly of "any cause of action" or "action," and do not specifically relate to minimum wage and overtime violations, these sections

also have no reference to child labor violations.[4] Since employees are granted a cause of action solely for wage and hour violations, it is apparent that these sections are concerned only with wage and hour violations.

2. *Wages and Hours Violations.*—Much of the foregoing argument as to the inapplicability of Section 6 of the Portal-to-Portal Act to the child labor provisions of the Walsh-Healey Act is equally germane to suits by the United States generally to enforce the Walsh-Healey Act. For example, the Congressional findings of Section 1 (a) referring to "windfall payments" (p. 16, *supra*), the encouragement of "champertous practices" (p. 16, *supra*), and the reference in the Section to "liquidated damages" (p. 16, *supra*), are all equally inapplicable to suits by the United States to enforce the wages and hours provisions. In addition, the reference of Section 2 (e) to the non-assignability of causes of actions is obviously inapplicable to the United States, and the use of the term "liquidated damages" in Sections 3 (b)

[4] Section 3 (a) (29 U. S. C., Supp. V, 253 (a)) permits the compromise "of any cause of action" under the Fair Labor Standards, the Walsh-Healey, and the Bacon-Davis Acts. Section 5 (29 U. S. C., Supp. V, 216 (b)) amends Section 16 (b) of the Fair Labor Standards Act to substitute class actions for representative actions. Section 7 (a) and (b) (29 U. S. C., Supp. V, 256 (a) and (b)) and Section 8 (29 U. S. C., Supp. V, 257) define when "an action" shall be considered to have been commenced as to an individual plaintiff.

and 11 is obviously directed toward employee suits and not to those brought by the United States.[5]

In our view, the manifestations of Congressional intent in the provisions of the Portal Act point to the interpretation that suits by the United States are not contemplated by Section 6 of the Act, and that the over-all purpose of the Act was, as its name implies, to relieve employers of what Congress regarded as "windfall" claims by employees under the Fair Labor Standards Act for minor "preliminary" or "postliminary" activities.

Specifically pertinent to the limitations provisions contained in Section 6 is the purpose expressed in Section 1 (a) to remedy the problems arising out of "the varying and extended periods of time * * * under the laws of the several

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[5] Also revealing are Sections 3 (a) and 5 (a), which do not specifically employ the term "liquidated damages." Section 3 (a) (29 U. S. C., Supp. V, 253 (a)) permits the compromise of "any cause of action under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act." This subsection has no relevance to suits brought by the Government since the authority of the Government to enter into compromise has long been established. See 38 Ops. A. G. 94, 98; Executive Order No. 6166, June 10, 1933, 5 U. S. C. 124; cf. *New York* v. *New Jersey*, 256 U. S. 296, 308. Similarly, Section 5 (a) (29 U. S. C., Supp. V, 216 (b)), which substitutes class actions for representative actions under the Fair Labor Standards Act, has no application on its face to Government suits under the Fair Labor Standards Act and the Walsh-Healey Act.

States."[6] Subsections (b) and (c) of Section 6 show that Congress intended only to displace the applicable state statutes of limitations by a uniform federal period of limitation. But state statutes of limitations, of course, are applicable to employee suits only, and have no application to the United States. *Harp* v. *United States,* 173 F. 2d 761, 763 (C. A. 10), certiorari denied, 338 U. S. 816; *United States* v. *Summerlin,* 310 U. S. 414, 416; *United States* v. *Thompson,* 98 U. S. 486; *United States* v. *Nashville, C. & St. L. Ry. Co.,* 118 U. S. 120, 125, 126; *Stanley* v. *Schwalby,* 147 U. S. 508, 514, 515; *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 132; *Board of Commissioners* v. *United States,* 308 U. S. 343, 351. That Section 6 relates to employee suits rather than to suits by the Government is further confirmed by Sections 7 and 8 (29 U. S. C., Supp. V, 256, 257) which provide, for the purposes of Section 6, that an action shall be considered to be commenced as to an individual claimant on the date that his written consent to become a party plaintiff is filed.

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[6] The entire paragraph in Section 1 (a) under "Findings and Policy" with respect to the issue of limitations reads as follows: "The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry."

This conclusion is substantiated by comparison of Section 6 with those sections of the Act which are applicable to suits by the United States. It is not without significance that where Congress intended to bar suits by the United States, it employed appropriate language to accomplish that purpose. Thus, the use of the words "liability or punishment" in Sections 2, 4, 9, and 10 comprehends actions by the United States for liquidated damages under the Walsh-Healey Act and criminal actions under the Fair Labor Standards Act. See H. Rep. No. 326, 80th Cong., 1st Sess., pp. 9, 16. Further, the use of the word "proceeding" in these sections would appear to relate to administrative means of enforcement as well.[7] The failure of Congress to employ similar comprehensive language in Section 6 is illuminating evidence of the scope of that section.

In summary, the manifestations of congressional intent in the provisions of the Portal-to-Portal Act point to the conclusion that actions by the United States under the Walsh-Healey Act are not affected by Section 6. At the very least, analysis of the terms of the Portal Act as a whole shows that the child labor provisions of the Fair Labor Standards and Walsh-Healey Acts are completely beyond the scope of the Portal Act.

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[7] See Hearings Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 80th Congress, 1st Session, on H. R. 584, p. 458, Appendix B, *infra*, pp. 100–102.

B. THE LEGISLATIVE HISTORY OF SECTION 6 OF THE PORTAL-TO-PORTAL ACT INDICATES THAT THE INTENTION OF CONGRESS WAS TO BAR POSSIBLE EMPLOYEE SUITS UNDER THE WALSH-HEALEY ACT, RATHER THAN TO CURTAIL ENFORCEMENT OF THE ACT BY THE GOVERNMENT

The courts of appeals, in *United States* v. *Lovknit Mfg. Co.*, 189 F. 2d 454 (C. A. 5), certiorari denied, 342 U. S. 915 (overtime and child labor), *Lance* v. *United States*, 190 F. 2d 204 (C. A. 4), certiorari denied, 342 U. S. 915 (child labor), *Garfunkel* v. *United States*, decided December 1, 1952 (C. A. 2) (overtime), and *United States* v. *W. H. Kistler Stationery Co.*, decided December 26, 1952 (C. A. 10) (child labor), have held that Section 6 applies to suits brought by the United States under the Walsh-Healey Act. These decisions were based upon an analysis of the terms of the Portal-to-Portal Act without reliance upon its legislative history. The court below has found that the legislative history of the Portal-to-Portal Act supports the Government's contention that Section 6 does not apply to suits brought by it under the Walsh-Healey Act, at least insofar as the child labor provisions of that Act are concerned.

We have shown (*supra*, pp. 21–33) that the text and structure of the Portal-to-Portal Act lead to the opposite result from that reached by the Courts of Appeals for the Second, Fourth, Fifth, and Tenth Circuits. It is our further view that the legislative history of the Act indicates that

the Walsh-Healey Act was brought within the purview of the Portal-to-Portal Act for the principal purpose of eliminating the possibility of employee suits under the Walsh-Healey Act which would circumvent the proposed amendments to the Fair Labor Standards Act. This history, viewed as an integrated whole and not in particularized segments, is consistent with the Government's contention that Section 6 does not apply to any action by the Government to enforce the provisions of the Walsh-Healey Act. It does show that the Portal-to-Portal Act does not affect suits brought by the Government under the child labor provisions of the Walsh-Healey Act.

We believe that, insofar as it relates to the applicability of suits brought by the Government to enforce the wages and hours provisions of the Walsh-Healey Act, there would be little profit in treating the legislative history in detail in this portion of our brief. This history is quite long and an appreciation of the comparatively few significant passages can be obtained only by examining the history as a whole.* We have, how-

* Because of the differences between the House and Senate bills which were submitted to the Conference, it is, perhaps, the Conference Committee action which is the most significant. In this connection, Section 1 of the Senate Bill had stated that "The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for attorney's fees, and in

ever, incorporated as Appendix B to this brief (*infra*, pp. ~~93-118~~ 94-119) a comprehensive review of this legislative history, to which we respectfully call the Court's attention. We do believe that there will be little dispute that the course of the bill (H. R. 2157), which was ultimately enacted by the Eightieth Congress as the Portal-to-Portal Act, is marked by three factors: (1) The basic concern of the Congress was to bar employee suits, and the legislative discussions and debates

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the case of the Bacon-Davis Act, for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts * * *." Section 10 (2) of the Senate bill had provided that "No liability for an additional amount as liquidated or other damages under the Walsh-Healey Act" should be predicated on an act done in good faith in reliance on an administrative ruling. 93 Cong. Rec. 2376, 2377. The Conference Committee changed Section 1 to its present form, i. e., "The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts * * *." The Committee also eliminated the language in Sections 9 (b) (1) and 10 (2) which spoke of liability for "an additional amount as liquidated or other damages under the Walsh-Healey Act." By these changes the Conference Committee recognized that the Walsh-Healey Act did not allow recovery of additional sums as liquidated damages, and manifested its understanding that the problem confronting Congress had reference solely to the liquidated damages provision of the Fair Labor Standards Act.

Significantly, the Conference Report contains no intimation that the present Section 6 was intended to be applicable

were almost wholly directed to this problem, not to Government enforcement actions. (2) Congress apparently assumed that employees had a right of action under the Walsh-Healey Act. (3) Insofar as the statute of limitations problem was considered, the concern of Congress was the lack of uniformity among the State statutes of limitations, a concern without application to the federal Government, which is of course not controlled by State statutes of limitations.

With respect to child labor violations of the Walsh-Healey Act, we submit that there can be no doubt as to the intention of Congress. As

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to suits by the United States. To the contrary, the thrust of the Report is on the manner in which varying state statutes of limitations—which are inapplicable to the United States—would be superseded by the new uniform federal period of limitation, H. Rep. 326, 80th Cong., 1st Sess., pp. 13–14, as is the explanation of the Report on the floor, 93 Cong. Rec. 4388. Further, although the Report is silent with respect to the applicability of Section 6 to the United States, it elsewhere expressly points out its understanding that employers would be relieved from criminal actions, as well as civil liability, under Sections 2, 9 and 10. (H. Rep. 326, *supra*, pp. 9, 11, 16. The changes made by the Conference Committee and the explanations offered by the Committee of those changes are persuasive evidence that the Walsh-Healey Act was included in Section 6 of the Portal-to-Portal Act, not to curtail enforcement actions brought by the Government, but to prevent possible flanking attacks by employee suits under that Act which would nullify the effect of the amendments to the Fair Labor Standards Act.

we have pointed out before, pp. 21–33, analysis of the terms of the Portal Act as a whole and the purpose of Congress set forth in Section 1 of the Act demonstrate that the child labor provisions of the Fair Labor Standards and Walsh-Healey Acts are completely beyond the scope of the Portal-to-Portal Act. As the court below held, the legislative history of the Act makes that conclusion even more compelling.

Nowhere in the several Committee reports and the lengthy debates is there any suggestion that the proponents of the bill sought to curtail enforcement by the Government of child labor standards. The attention of Congress was directed exclusively to the fields of minimum wages and overtime compensation. According to the House Judiciary Committee, the Walsh-Healey and Bacon-Davis Acts were included in the bill because (H. Rep. No. 71, *supra*, p. 5):

> The Walsh-Healey Act also concerns itself in its field with *minimum wages and overtime compensation.* The Bacon-Davis Act has provisions relating to *minimum wages* and other conditions of employment. These two acts are therefore affected by the Mount Clemens decision. The situation described herein as to the Fair Labor Standards Act applies to that existing under the Walsh-Healey Act and the Bacon-Davis Act. The same necessity exists there for remedial legislation. [Emphasis supplied.]

The same scope of the portal-to-portal problem was recognized by the Senate Judiciary Committee. Setting forth the background of the problem, that Committee stated in its report that "attention is invited to three aspects of the [Fair Labor Standards] Act: (1) minimum wages, (2) maximum hours, and (3) 'oppressive child labor.' This report is concerned primarily with aspect (2)." S. Rep. No. 48, *supra*, p. 5. Although the report goes on to discuss minimum wages as well as maximum hours, it nowhere discusses child labor.

Of particular significance here are the comments, with respect to the scope of the limitations provision, of those who guided the bill through Congress. Thus, Mr. Gwynne declared that we should "bear in mind that this limitation applies only to statutory actions, which seek to recover not only the minimum wages or the overtime compensation but an additional amount as liquidated damages, and attorneys' fees and costs," 93 Cong. Rec. 1557. His reference to "*an additional amount* as liquidated damages" clearly relates to actions for minimum wages and overtime compensation, there being no "additional amounts as liquidated damages" in actions for child labor violations. [Emphasis added.] Senator Wiley, the Chairman of the Senate Judiciary Committee, stated "Section 9 (b) provides, similarly, a 2-year statute of limitations as to such *wage claims* when

they are brought under the Walsh-Healey Act or Bacon-Davis Act," 93 Cong. Rec. 2086 [emphasis supplied]. Likewise, Senator Cooper, a member of the Senate Judiciary Subcommittee which considered the bill, observed "with respect to the Walsh-Healey Act and the Bacon-Davis Act, that both acts provide for the payment of *minimum wages for work*. Certainly, if the contracts under those acts affected interstate commerce, the same question of liability for portal-to-portal activities would apply to those contracts as to any other contracts," 93 Cong. Rec. 2130 [emphasis supplied]. And Senator Wherry pointed out that "the real answer, insofar as the Walsh-Healey Act and the Bacon-Davis Act are concerned, is that the evidence before the Senate and the House committees on the pending portal-to-portal suits is equally applicable to support legislation affecting all three acts, for the simple reason that the Walsh-Healey and Bacon-Davis Acts involve payments *for hours worked,*" 93 Cong. Rec. 2193 [emphasis supplied].

Finally, as noted above, fn. 8, pp. 35–36, the limitations provision of the Senate bill (Sec. 9 (b) (1)) referred to "Every claim under the Walsh-Healey Act or the Bacon-Davis Act for unpaid minimum wages or unpaid overtime compensation, and under the Walsh-Healey Act for an additional amount as liquidated or other damages." The reference to "liquidated *or other*

damages" plainly related to actions for unpaid minimum wages and overtime compensation, there being no "other damages" in actions for child labor violations. [Emphasis added.] In eliminating the phrase, "an additional amount," from the present Section 6 of the Act, the Conference Committee undoubtedly intended the same limitation on the scope of the term "liquidated damages." Certainly, there is no evidence of a contrary purpose.

In conclusion, to construe Section 6 of the Portal-to-Portal Act as applicable to the Government in the circumstances here presented would be to construe the Act in a way inconsistent with its history, its terms, and its express policy. Such construction would be particularly inappropriate under the settled rule that statutes of limitations should not be held applicable to the Government "unless Congress has clearly manifested its intention." *United States* v. *Nashville, C. & St. L. Ry. Co.*, 118 U. S. 120, 125. See also cases cited *supra*, pp. 18–19. Where, as here, there is no express reference to the United States in Section 6, its legislative history indicates no such intent, and the construction for which the petitioner contends would seriously impair, if not cripple, the effective enforcement of the statute, as well as upset the established enforcement system—in opposition to the statutory scheme (see pp. 42–53, 59–62, *infra*)—the burden of showing the clear manifes-

tation of Congressional intention to apply Section 6 to the United States cannot be carried.[9] Cf. Pet. Brief, p. 16.

III. IF SECTION 5 OF THE PORTAL-TO-PORTAL ACT APPLIES TO SUITS BROUGHT BY THE UNITED STATES UNDER THE WALSH-HEALEY ACT, THE PRESENT SUIT WAS NEVERTHELESS TIMELY FILED

Assuming *arguendo* that Section 6 of the Portal-to-Portal Act is applicable to suits brought by the United States, the present suit was nevertheless timely filed. Section 6 provides that an "action" which is not commenced "within two years after the cause of action accrued" shall be forever barred. We submit that a cause of action accrues, and the two-year period begins to run, only after it is administratively determined by the Department of Labor, in accordance with the provisions of Section 5 of the Walsh-Healey Act,

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[9] If it should eventually be definitively established that employees cannot maintain their own actions under the Walsh-Healey Act, that would not be evidence that Section 6 of the Portal-to-Portal Act was intended to apply to the United States because the United States is the only party to which it could then apply, as was held in *United States* v. *Lovknit Mfg. Co.*, 189 F. 2d 454 (C. A. 5). The clear intention of Congress to bar employee suits obviously cannot be converted into an intention to do something else because the courts may ultimately decide that employees do not have the right to sue. The right was apparently assumed when the Portal-to-Portal Act was enacted, and the assumption was by no means without some foundation. Cf. *Filardo* v. *Foley Bros.*, 297 N. Y. 217, reversed on other grounds, 336 U. S. 281.

that the contractor is liable to the United States for liquidated damages for violation of that Act. In the present case, the Government's action was begun eleven months after the conclusion of the administrative proceedings (R. 1, 3). In the alternative, assuming that the Government's cause of action accrues, and the period of limitation begins to run, when the Walsh-Healey Act is, in fact, violated, we submit that the initiation of administrative proceedings is the commencement of an "action" for the purposes of Section 6 of the Portal-to-Portal Act.

A. THE WALSH-HEALEY ACT CONTEMPLATES ADMINISTRATIVE PROCEEDINGS AS A PREREQUISITE TO SUIT BY THE ATTORNEY GENERAL

The basic structure of the Walsh-Healey Act (*infra*, pp. 73–78) and the respective functions of the Secretary of Labor and the Attorney General are clearly revealed in the terms of the Act. The Secretary of Labor is "authorized and directed" to administer the provisions of the Act and "to prescribe rules and regulations with respect thereto" (Sec. 4). He is empowered to "make investigations and findings" and to "prosecute any inquiry necessary to his functions" (Sec. 4). He is further authorized to hold hearings "upon his own motion" and "on complaint of a breach or violation" and "to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath" (Sec. 5). His sub-

poenas are enforceable in the district courts (Sec. 5). The Secretary is directed to make "findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor * * * shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act" (Sec. 5).

"Unless the Secretary of Labor otherwise recommends," no contracts are to be awarded for a period of three years to any persons or firms "found by the Secretary of Labor" to have violated the Act (Sec. 3). Further, for violations of the Act, the United States is authorized to withhold monies due it as liquidated damages from any amounts due on the contract. Such monies are to be held in a special fund and to be paid "on order of the Secretary of Labor" directly to the employees concerned (Sec. 2). Suits to recover the liquidated damages due the United States, however, are to be "brought in the name of the United States of America by the Attorney General thereof" (Sec. 2).

Pursuant to these statutory directions and authorizations, the Department of Labor early established the procedure of issuing formal complaints and holding hearings before a trial

examiner of the Public Contracts Division where investigation indicated possible noncompliance with the Act. The trial examiner's report is referred to the Public Contracts Administrator for a decision which becomes final unless appealed to the Secretary of Labor. The administrative decision contains the formal determination of liquidated damages and becomes the basis for the application of the administrative sanctions provided by the Act. Upon the failure of the contractor to make payment in accordance with the administrative decision after hearing, the matter is referred to the Attorney General for suit based upon the administrative determination of liability. Rules of Practice, issued July 27, 1939, Wage and Hour Reporter, Bureau of National Affairs, vol. 2, p. 515 (Dec. 11, 1939). Cf. 41 CFR (1949 ed.) Part 203.

The significance of the administrative hearing provisions of the Act is clearly delineated by the decision of this Court in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501. There, the district court had refused to direct the enforcement of subpoenas issued by the Secretary of Labor on the theory that the contractor was entitled to a judicial determination of certain issues before being required to produce specified records at an administrative hearing. The court of appeals reversed on the ground that the district court completely misconceived the nature of the ad-

ministrative and judicial functions under the Act. *Perkins* v. *Endicott Johnson Corp.*, 128 F. 2d 209 (C. A. 2). The Walsh-Healey Act was read by the court as providing for "administrative proceedings * * * contemplating final orders which will be judicially reviewable" (*Id.* at 215). The "final administrative order" was viewed as a determination which would render contractors "liable for liquidated damages, and in a suit for recovery of the same, they will obtain judicial review" (*Id.* at 215).

This Court affirmed the judgment of the court of appeals in terms which leave no doubt that the administrative determination by the Secretary of Labor is a condition precedent to judicial enforcement. After referring to the Secretary's statutory duty to make "findings of fact after notice and hearing" and the circumstances in which the "findings shall be conclusive," the Court in unequivocal language, clearly at odds with petitioner's contention that enforcement proceedings may be instituted by the Attorney General without a prior administrative determination by the Secretary of Labor (Pet. Brief 20), ruled that "Congress submitted the administration of the Act to the judgment of the Secretary of Labor, not to the judgment of the courts." 317 U. S. at 503, 507.

The mandatory character of this submission is evidenced by the Court's statement that "One of

[the Secretary's] *principal functions* is the conclusive determination of questions of fact." It referred to this determination as the Secretary's "statutory duty" and to the computation of liquidated damages as a function "[the Secretary] is required" to perform. It disapproved "action of the District Court" which disabled the Secretary "from rendering a complete decision on the alleged violation *as Congress had directed* [the Secretary] to do." 317 U. S. at 503, 507–509. [Emphasis supplied.]

A similar view was expressed by a specially constituted three-judge court in the Ninth Circuit in *Anderson* v. *Schwellenbach,* 70 F. Supp. 14 (N. D. Cal.). Denying the contractor's prayer for an injunction of pending administrative proceedings, the court stated that "administration of the act is entrusted to the Secretary of Labor who is authorized to make investigations and findings or to delegate these functions to representatives. Among other sanctions the act provides that violation of its standards renders the contractor liable to the United States for liquidated damages in the sum of $10 per day for each infringement of the child and convict labor standards and a sum equal to the amount of underpayments for violation of the minimum wage and overtime standards. Sums due the Government by reason of such violations may be withheld from any amounts owing on such contracts or may be re-

covered in suits brought by the Attorney General in the name of the United States. * * * *The ultimate administrative determination affords the basis for the withholding of sums or the institution of suit by the Government"* (*id.* at 15). [Emphasis supplied.]

Continuing, the court observed that *"If, as the result of the findings and report in the administrative proceeding, suit is brought to recover the damages found due,* the plaintiffs will have opportunity to raise the constitutional point urged. The same will be true in the event plaintiffs are themselves placed under the necessity of suing in consequence of the withholding by the Government of sums due in the contract. * * * Again, it may well turn out that plaintiffs will neither be sued nor put under the necessity of suing. * * * *it may be that the findings in the administrative proceeding will exonerate them from any violation of the act"* (*id.* at 16). [Emphasis supplied.]

In fine, the detailed statutory provisions for administrative proceedings, and the important role assigned the administrative determination in the statutory scheme—which makes that determination conclusive on other government agencies and, if supported by a preponderance of the evidence, on the courts—clearly demonstrate the intention of Congress to make the Secretary of Labor's findings the basis for suit by the Attorney General.

Petitioner's argument to the contrary is based on a fragmentary reading of the statute which separates the sentence in Section 2 providing that suits shall be brought by the Attorney General from the detailed provisions of Sections 4 and 5 confining the administration of the Act in the first instance to the Secretary of Labor. It overlooks the important fact that statutory violations are, unlike ordinary breaches of contract, not self-revealing and that, under the statutory scheme, the Attorney General would have no basis for proceeding except upon the request of, and the information supplied by, the Secretary of Labor. This argument that the Attorney General may commence an action to recover the liquidated damages due the United States prior to the determination by the Secretary of Labor that such sums are in fact due would force a complete revision of the procedures by which such violations are investigated and determined. As is apparent from the statutory scheme, and, as is the practical fact, the Attorney General has no independent basis upon which to commence an action, and the Walsh-Healey Act gives him no power to undertake such an investigation. If it be assumed that Congress intended Section 6 of the Portal-to-Portal Act to apply to the United States, it cannot also be assumed, in the light of the legislative history of the Portal-to-Portal Act, that Congress intended by Section 6 to re-

vise completely the existing procedures for investigation and enforcement under the Walsh-Healey Act.

Moreover, to assume, as petitioner does, that suit may be instituted by the Attorney General without prior administrative proceedings, is wholly inconsistent with the principle reiterated in numerous decisions of this Court that, where Congress has reposed "primary jurisdiction" to make a policy or factual determination in an administrative agency, the courts will stay their hands until the administrative agency endowed with its particular experience has had an opportunity to act, even where the statute does not—as does the Walsh-Healey Act—implicitly require the administrative proceedings to precede judicial action. See *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 439–442; *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District*, 304 U. S. 295; *Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422; *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 437. The principle that administrative action should be taken before judicial aid is invoked has also been declared in a host of other situations. See, e. g., *Addison* v. *Holly Hill Co.*, 322 U. S. 607; *Federal Trade Comm.* v. *Morton Salt Co.*, 334 U. S. 37; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134; *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364.

This doctrine was reaffirmed as recently as last Term in *Far East Conference* v. *United States*, 342 U. S. 570, 574–575, in a case where there was not as explicit provision for preliminary administrative determination as in the Walsh-Healey Act:

> The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Of special interest in the present case is the Court's further observation concerning the origin of the doctrine (*id.*, at 575):

> It is significant that this mode of accommodating the complementary roles of

courts and administrative agencies in the enforcement of law was originally applied in a situation where the face of the statute gave the Interstate Commerce Commission and the courts concurrent jurisdiction.

Petitioner's argument that the Walsh-Healey Act does not require administrative proceedings to precede suits by the Attorney General is entirely at odds with these decisions, particularly since the Act plainly implies that court action must follow, and be based on, the administrative award. The desirability of achieving uniformity in administration, one of the bases of the primary jurisdiction doctrine, renders the doctrine peculiarly applicable to the Walsh-Healey Act. The Act requires administrative determination for other purposes of the very question which would be in issue in an enforcement action brought by the Attorney General, *i. e.*, whether the contractor had violated the Act. As we have seen, Section 2 of the Act provides for the recovery of liquidated damages not only in suits by the Attorney General in the name of the United States, but also by withholding such sums from any amounts due the contractor. In addition, Section 3 directs the promulgation of a blacklist of the names of those found by the Secretary of Labor to have violated the Act. For such purposes, Section 5 makes the administrative findings "conclusive upon all agencies of the United States." Accordingly, the ad-

ministrative hearings and findings are basic to the application of those administrative sanctions and must necessarily precede their imposition. It follows, we submit, that the administrative hearings and findings must also precede and be the basis of an enforcement action by the Attorney General if the Act is to be read as a harmonious whole.

Indeed, the fact that administrative sanctions have been provided also fortifies the conclusion that Section 6 of the Portal-to-Portal Act was not intended to apply to suits by the United States. Unless the administrative proceedings be regarded as an "action", within the meaning of Section 6, to enforce the Government's cause of action (see *infra*, pp. 66–71), the period of limitation does not apply to the administrative sanctions. Cf. *Dorsey* v. *Reconstruction Finance Corporation*, 197 F. 2d 468, 471 (C. A. 7).. If, therefore, Section 6 is applied to the United States, a completely incongruous result would obtain, depending upon the fortuitous circumstance of the time of the payment for the work performed under the contract. Where the Government owes money to the contractor, it could deduct the liquidated damages and thus collect them administratively even after the elapse of the two-year period. But where the Government had already paid all amounts owed, no enforcement could be had, since no suit could be brought. An intent to have the statute operate in this incongruous fashion should not be at-

tributed to Congress in the absence of the clearest evidence of such a design.[10]

B. THE GOVERNMENT'S CAUSE OF ACTION ACCRUED, AND THE PERIOD OF LIMITATION BEGAN TO RUN, WHEN IT WAS ADMINISTRATIVELY DETERMINED THAT PETITIONER IS LIABLE TO THE UNITED STATES FOR LIQUIDATED DAMAGES

If administrative proceedings and findings are prerequisite to suit by the Attorney General, the Government's cause of action necessarily accrued, and the two-year period of limitation began to run, only after it was administratively determined that petitioner is liable to the United States for liquidated damages.

It has long been settled in this Court and other courts that a period of limitation begins to run only after all events prerequisite to suit have occurred. For "it cannot be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." *Borer* v. *Chapman,* 119 U. S. 587, 602; cf. *Woods* v. *Stone,* 333 U. S. 472; *Fisher* v. *Whiton,* 317 U. S. 217; *Rawlings* v. *Ray,* 312 U. S. 96; *United States* v. *Wurts,* 303 U. S. 414; *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258; *Clark* v. *Iowa City,* 20 Wall. 583, 587; *Amy* v. *Dubuque,* 98 U. S. 470,

[10] As indicated earlier, the evidence is all the other way. Cf. *Perkins* v. *Endicott-Johnson Corp.*, 128 F. 2d at 215, n. 20a, which assumes that the Secretary would lift the Section 3 black list (41 U. S. C. 37) as to a particular contractor if his findings were reversed.

475; *Cooke* v. *Gill,* L. R. 8 C. P. 107 (1873); *Read* v. *Brown,* L. R. 22 Q. B. D. 128 (1888); Wood, *Limitations* (4th Ed. 1916), § 122a.[11] As this Court stated in *Woods* v. *Stone,* 333 U. S. at 477, "It would be unusual, to say the least, if a statutory scheme were to be construed to include a period during which an action could not be commenced as a part of the time within which it would become barred."

This observation is directly pertinent here. The present suit is based upon an administrative determination that petitioner is liable to the United States for liquidated damages for violation of the Walsh-Healey Act. To hold that the two-year period of limitation began to run prior to that determination is necessarily to include "a period during which an action could not be commenced" by the Government. In the light of the statutory scheme which makes the administrative determination a prerequisite to suit, any such holding would not, we submit, be warranted. Cf. *Schaeffer* v. *United States,* 114 C. Cls. 568, cer-

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[11] See also *Dusek* v. *Pennsylvania R. Co.*, 68 F. 2d 131 (C. A. 7); *Paulson* v. *United States*, 78 F. 2d 97, 99 (C. A. 10); *Federal Reserve Bank* v. *Atlanta Trust Co.*, 91 F. 2d 283 (C. A. 5), certiorari denied, 302 U. S. 738; *Bass* v. *Standard Accident Insurance Co.*, 70 F. 2d 86, 87 (C. A. 4); *Taylor* v. *Salt Creek Consol. Oil Co.*, 285 Fed. 532, 541 (C. A. 8); *Cary* v. *Koerner*, 200 N. Y. 253, 259; *Dept. of Banking* v. *McMullen*, 134 Neb. 338, 345; *Farneman* v. *Farneman*, 46 Ind. App. 453, 457.

tiorari denied October 20, 1952, No. 232, this Term.[12]

Prior to the decision of the Fifth Circuit in the *Lovknit* case (*supra,* p. 33), five different district judges, in reliance upon the same understanding of the prime importance of the administrative determination under the Walsh-Healey Act that is evidenced in the *Endicott Johnson* and *Anderson* cases (see *supra,* pp. 44–47), held the Government's action not barred if brought within two years after the administrative determination. *United States* v. *Hudgins-Dize Co., Inc.,* 83 F. Supp. 593 (E. D. Va., Bryan, J.); *United States* v. *Harp,* 80 F. Supp. 236 (W. D. Okla., Broaddus, J.), affirmed on other grounds, 173 F. 2d 761 (C. A. 10), certiorari denied, 338 U. S. 816; *United States* v. *Craddock-Terry Shoe Corp.,* 84 F. Supp. 842 (W. D. Va., Paul, C. J.), affirmed on other grounds, 178 F. 2d 760 (C. A. 4); *United States* v. *Sweet Briar, Inc.,* 92 F. Supp. 777 (W. D. S. C., Wyche, J.); *United States* v. *Lance, Inc.,* 95 F. Supp. 327 (W. D. N. C., Warlick, J.), reversed, 190 F. 2d 204 (C. A. 4). As the carefully reasoned opinion of District Judge Paul in the *Craddock-Terry Shoe Corp.* case points out (84 F. Supp. 846):

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[12] In the *Schaeffer* case, the Government contended that the particular administrative proceedings there concerned—claims before the War Shipping Administration for just compensation under Section 902 of the Merchant Marine Act, 46 U. S. C. 1242—were not legally prerequisite to suit, but the Court of Claims took a different view.

> It seems the plain intendment of the statute that administrative proceedings, consisting of the hearing, the findings of fact, and the decision of the Secretary, shall be the process whereby the Secretary determines whether the United States has a claim and the amount of it; and only when this has been determined and the contractor has refused payment, is resort to be had to the courts. The administrative proceedings appear to be a prerequisite to an assertion of the claim for damages; and it would appear that not until the conclusion of these proceedings with the Secretary's decision does the Government have a right of action in the courts for collection of the damages. * * * *

But even if it be assumed that suit can be brought without a prior administrative determination, it can hardly be denied that the Act clearly authorizes a suit based on the administrative decision. This necessarily follows from the explicit provision, among others, making the administrative decision conclusive upon the courts, if supported by a preponderance of the evidence. *Harp* v. *United States*, 173 F. 2d 761 (C. A. 10), certiorari denied, 338 U. S. 816.[13] Thus, even if

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[13] Petitioner's suggestion (Pet. Brief 18–19) that the "conclusive effect" which is to be given to the Secretary of Labor's findings in "any court of the United States" is not necessarily applicable to suits brought by the Attorney General upon the findings of the Secretary that there has been a violation of the Walsh-Healey Act, clearly has no merit. The only court

the courts can entertain suit without a prior administrative proceeding; the complementary roles assigned the Secretary of Labor and the courts strongly suggest that, at the very least, two causes of action are available to the Government: (1) a cause of action which accrues immediately upon violation of the Act, whether or not such violation be known to the Government; and (2) a cause of action which accrues after administrative proceedings have resulted in the determination that liquidated damages are due the United States.

Where two causes of action are available in a given set of circumstances—one based on an administrative determination of liability and the other on the violation itself—the one is not barred merely because the other, if brought, would have been. *Bonwit Teller & Co. v. United States,* 283 U. S. 258; *United States v. Whited & Wheless,* 246 U. S. 552; *Independent Coal Company* v. *United States,* 274 U. S. 640, 650. "This doctrine, that where there are two remedies for the protection of a right one may be barred and the other not, is no novelty in the law. So long ago as 5 Pickering, in *Lamb* v. *Clark,* pp. 193, 198, it was tersely stated as then familiar doctrine

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proceeding mentioned in the Walsh-Healey Act is that brought by the Attorney General to enforce the Secretary's findings. The statute cannot be read to exclude the "conclusive effect" of the findings from the only court action the statute expressly contemplates.

that 'If an injured party has a right to either of two actions, the one he chooses is not barred, because the other, if he had brought it, might have been.' And the principle has frequently been recognized by this and other courts." *United States* v. *Whited & Wheless, supra,* at 564. Accordingly, the present cause of action, which the complaint clearly shows is based on the Secretary of Labor's decision, did not accrue until the amount of the liquidated damages had been fixed by him, and is not barred even if a suit based directly upon the violation itself would be barred.

That there is no period of limitation upon the commencement of administrative proceedings does not argue against the correctness of this view. At the time of enactment, no period of limitation was placed in the Walsh-Healey Act upon enforcement by the Government. There is no suggestion anywhere in the legislative debates relating to the Portal-to-Portal Act, passed some eleven years later, that any abuses or evils resulted from failure to provide a period of limitation for Government actions under the Walsh-Healey Act.

Moreover, the lack of any limitations bar upon the enforcement of public law is not an unusual condition. On the contrary, as already pointed out, statutes of limitations do not ordinarily apply to the Government. This is "an element of the English law from a very early period." *United*

States v. *Thompson*, 98 U. S. 486, 489; see also *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112; *duPont de Nemours & Co.* v. *Davis*, 264 U. S. 456; *United States* v. *Whited & Wheless*, 246 U. S. 552. Nor is there any inequity where, as here, the statute "is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract." *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 507. The contracts in the present case were executed at a time when it was absolutely clear that no period of limitation was applicable.

On the other hand, enforcement of the Act would be seriously impaired if, as petitioner contends, investigation, discovery of violations, institution of administrative proceedings, preparation for and conduct of hearings, making of the initial administrative findings, completion of successive administrative appeals, rendition of the final administrative determination, and institution of suit by the Attorney General—the administrative procedure contemplated by the Act and put into practice by the Secretary of Labor—must all be accomplished within two years after the violation.

As we have indicated (*supra*, pp. 19–20), a comprehensive review of enforcement actions indicates that the possibility of devising any effective

enforcement procedure in conformity with petitioner's interpretation of the limitations provision is extremely remote. It is extraordinarily difficult to commence an action to collect liquidated damages, the principal sanction for enforcing the Act, within two years after the violations. The lapse of two years or more before court action arises from a variety of factors—lack of knowledge of the violations at the time they occur, the time necessarily consumed in investigation and in the administrative proceedings, and the fact that violations do not usually occur as single instances but continuously or intermittently over a period of time.

Though the Secretary of Labor receives reasonably prompt notice of the award of a contract subject to the Act, there are far too many contracts to permit inspection in all cases. Even in normal times, appropriations permit inspections of only about one-fourth of the number of contractors each year. An attempt is made to investigate new contractors, *i. e.*, those who have not previously held Government contracts, prior to the completion of the first contract. But most other contractors cannot, as a practical matter, be investigated prior to the completion of their contracts. Thus, more than two years may have elapsed before an inspection can even be made. This problem is greatly aggravated, of course, by the tremendous current increase in the number of contractors by reason of the national emergency.

The ratio of inspections to contractors has sunk to approximately 17 percent.

Moreover, even if investigation results in prompt discovery of a violation, the administrative hearings and inter-departmental arrangements contemplated by Sections 2 and 5 of the Act are promptly carried to conclusion, and a complaint is filed within two years from the date of the last violation, the bulk of the Government's claim may still be lost. Unlike most causes of action which arise in full amount upon the occurrence of some event, these claims accrue from day to day and week to week as under-age minors are employed or as the employer fails to pay the required wages. Thus, when an investigator discovers an employer who has been violating the Act over the preceding two years, one week of the two years' liability would be cut off for every week which elapses before the complaint is filed in court. Accordingly, even if all of the intervening events are accomplished within a period of two years, so little would be left of the claim that the sanction of liquidated damages would be vitiated.

Finally, the construction of the limitations provision which petitioner urges is one which would make it virtually impossible to resolve cases by amicable settlement without resort to the courts. In most cases where violations are found, under the present enforcement procedures, the contractor will voluntarily pay the liquidated damages

without the institution of administrative proceedings, and court action is required in very rare instances. The importance of such amicable settlements in the program of enforcement is apparent from the fact that, in the period from July 1, 1948, through September 30, 1952, violations giving rise to a claim for liquidated damages were discovered in over 3,733 cases,[14] but it was found necessary to institute formal administrative proceedings in only 82 cases and to bring suit in only 32 cases. If petitioner's view were to be adopted, the Government would be compelled to file suit even though settlement negotiations were still in progress, thus placing an additional burden on the courts.

In sum, the interpretation of the limitations provision for which petitioner contends would disrupt the system of enforcement procedure consistently followed by the Departments of Labor and Justice since the passage of the Act, and would frustrate the objective of the Act to use the national purchasing power to "raise labor standards." *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 507.

[14] Thirty-seventh Annual Report of the Secretary of Labor, p. 89; Thirty-eighth Annual Report of the Secretary of Labor, p. 219; 1951 Annual Report of the Wage and Hour and Public Contracts Division, Department of Labor, p. 18, table 7; 1952 Annual Report of the Wage and Hour and Public Contracts Division, Department of Labor, p. 30, table 8; Quarterly Summary of Statistics, Department of Labor, Wage and Hour and Public Contracts Division, first quarter of 1953 fiscal year, p. 3.

The position we urge is neither foreclosed by, nor inconsistent with, this Court's decisions in *Pillsbury* v. *United Engineering Co.*, 342 U. S. 197, and *McMahon* v. *United States*, 342 U. S. 25. The question involved in the *United Engineering* case bears little, if any, resemblance to the present one. There, the issue was whether the word "injury" in Section 13 (a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 913 (a))—which provides that "The right to compensation for *disability* under this Act shall be barred unless a claim therefor is filed [with the Deputy Commissioner] within one year after the *injury*" [emphasis supplied]—should be construed to mean compensable injury or accident. The Court held that "Congress knew the difference between 'disability' and 'injury' and used the words advisedly. This view is especially compelling when it is noted that the two words are used in the same sentence of the limitations provision; therein 'disability' is related to the right to compensation, while 'injury' is related to the period within which the claim must be filed," 342 U. S. at 199. Contrary to petitioner's reading of the case (Pet. 8, Pet. Brief 19–20), no issue was there raised with respect to whether an administrative determination of "disability" or "injury" was prerequisite to the accrual of a cause of action in favor of the employee. Rather, the limitations provision related to the time in which the

employee could file his claim with the administrative agency.

The similarities between the statute of limitations issue in the *McMahon* case and the issue here presented are entirely superficial. The Court there held that the two-year limitations provision in the Suits in Admiralty Act (46 U. S. C. 745) runs from the date of the actionable wrongs rather than from the date of the administrative disallowance of the seaman's claim against the Government. But that holding rests upon the particular legislative situation there involved and upon other grounds not present in the instant case.

The primary ground for the decision appears to be contained in the following paragraph (342 U. S. at 27):

> It [the Suits in Admiralty Act] was enacted several years before suits such as the present, on disallowed claims, were authorized. Certainly during those years the limitation depended upon the event giving rise to the claims, not upon the rejection. When later the right to sue was broadened to include such claims as this, there was no indication of any change in the limitation contained in the older Act.

The situation here is precisely the reverse. The limitations provision is part of the Portal-to-Portal Act of 1947, enacted some eleven years after the Walsh-Healey Act, which gives rise to the

substantive claim. During this entire eleven-year period, the Act was consistently construed and enforced on the assumption that the administrative determination of liability, and not the violation itself, gives rise to the claim on which suit could be brought. This ground of the *McMahon* decision is, therefore, entirely lacking in this case.

Another basis is that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *Ibid.* This principle, far from supporting petitioner, suggests the applicability of the equally well-established principle that statutes of limitation "are to be construed strictly in favor of the sovereign." *United States* v. *Whited & Wheless,* 246 U. S. 552; *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640; *duPont de Nemours & Co.* v. *Davis,* 264 U. S. 456.

The remaining reason specified in the *McMahon* opinion is that (342 U. S. at 27):

> Since no time is fixed within which the seaman is obliged to present his claim, under petitioner's position he would have it in his power, by delaying its filing, to postpone indefinitely commencement of the running of the statute of limitations and thus *to delay indefinitely knowledge by the Government that a claim existed.* We cannot construe the Act as giving claimants an option as to when they will choose to start the period of limitation of *an action*

against the United States. [Emphasis supplied.]

In the instant case, on the other hand, petitioner would construe the limitations provision in such a manner as to prejudice claims *by* the Government and to start the period running before there is opportunity for the acquisition of "knowledge by the Government that a claim existed." Unlike the situation in the *McMahon* case, where the *claimant* knows immediately of the injury out of which his claim arises, under the Walsh-Healey Act the *defendant* contractor knows of the violations of the Act at the time they occur, but such violations do not come to the attention of the Government until an investigation can be conducted, which may be long after the violations have occurred. Thus, much, if not all, of a two-year period may have expired before the violations even come to the attention of the Government. This consideration strongly suggests a legislative intent quite different from the legislative intent in the *McMahon* situation. Cf. *United States* v. *Wurts,* 303 U. S. 414; *Woods* v. *Stone,* 333 U. S. 472, 477.

C. ASSUMING THAT THE GOVERNMENT'S CAUSE OF ACTION ACCRUED, AND THE PERIOD OF LIMITATION BEGAN TO RUN, WHEN THE WALSH-HEALEY ACT WAS VIOLATED, THE INITIATION OF ADMINISTRATIVE PROCEEDINGS WAS THE COMMENCEMENT OF AN "ACTION" WITHIN THE MEANING OF SECTIONS 6 AND 7 OF THE PORTAL-TO-PORTAL ACT

Up to this point, we have argued that, even if Section 6 of the Portal-to-Portal Act applies to

suits by the Government under the Walsh-Healey Act, the Government's cause of action accrues, and the period of limitation begins to run, when it is administratively determined that liquidated damages are due the United States. Assuming, however, that we are in error in that view and that the cause of action accrues, and the period of limitation begins to run, when the Walsh-Healey Act is, in fact, violated, the further question remains whether the initiation of administrative proceedings may be deemed to be the commencement of an "action" for the purposes of Section 6. In the present case, administrative proceedings were instituted within two years of the violations (R. 3, 36).

Section 7 of the Portal-to-Portal Act states that "an action is commenced for the purposes of section 6 * * * on the date when the complaint is filed." It is evident from our prior discussion, *supra*, pp. 21–42, that, even assuming the applicability of the Portal-to-Portal Act to Government suits, Congress was primarily concerned with employee suits. The terms of the Act were designed to deal with the problems raised by such suits, and the language employed by Congress is inept when sought to be applied to the Government. This is particularly true with respect to Section 7 in light of the integral role assigned by the Walsh-Healey Act to administrative proceedings in the enforcement of the Act. Since there is no evidence of any legislative intent to

emasculate enforcement of the Walsh-Healey Act, we suggest that Section 7 should be construed in a manner which would accommodate both the statutory scheme of the Walsh-Healey Act and the intention of Congress in the Portal-to-Portal Act to provide a fixed period of limitation, *i. e.*, that an action be considered to be commenced "on the date when the complaint is filed *with the Secretary of Labor.*"

This interpretation would be consistent with present concepts of the "collaborative" and "complementary" interrelationship of the administrative and judicial processes. Cf. *Perkins* v. *Endicott Johnson Corp.*, 128 F. 2d at 216, 225 (C. A. 2). The analogy between administrative and judicial proceedings has frequently been recognized. In *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 15, an administrative proceeding was deemed to be "analogous to a suit in equity to obtain an injunction, and should be governed by like considerations." The right to withdraw a registration statement, the Court held, was governed by the principles relating to the right of a judicial suitor to dismiss the proceeding he instituted. *Id.* at 19. Similarity was also perceived in *Morgan* v. *United States*, 298 U. S. 468, 480, where the Court observed:

> A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an

> order supported by such findings, has a quality resembling that of a judicial proceeding.

See also *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 140–141; *United States* v. *Morgan*, 313 U. S. 409, 422; *Federal Communications Commission* v. *WJR*, 337 U. S. 265, 274–277.

As previously pointed out, it has always been the practice to initiate Walsh-Healey hearings by the issuance of a formal complaint alleging the specific violations with which the contractor is charged. Respondent then files an answer, and public hearings are held before a trial examiner, during which witnesses are examined and cross-examined. Formal findings of fact and conclusions of law are issued, and the respondent is afforded an opportunity for review by the Secretary of Labor of the trial examiner's determination. The administrative proceedings under the Act closely resemble, therefore, the normal judicial trial.

To treat the initiation of those proceedings as the commencement of the "action" under the Walsh-Healey Act would have the advantage of avoiding the results previously described, pp. 60–62. It would pay due deference to the statutory scheme of the Walsh-Healey Act, and would be in accord with the doctrine of "primary jurisdiction" under which the courts, even though possessed of concurrent jurisdiction, stay their hands

until the administrative agency has had an opportunity to act. Finally, this interpretation would serve the basic purpose of the limitations provision by avoiding indefinite postponement of the period of limitation and providing notice of the existence of the Government's claim.

That there would be no specific period of time in which the Government would be required to bring suit based on the administrative determination is not, we believe, a material defect. Presumably, such suits would be brought within a reasonable period thereafter—a period measurable in terms of whether the contractor could make a showing of prejudice resulting from the delay. Cf. *Gardner* v. *Panama R. Co.*, 342 U. S. 29, 31.

We submit, therefore, that, if the Government's cause of action be deemed to accrue at the time of violation rather than at the date of administrative determination of liability, the objectives of the Portal-to-Portal and Walsh-Healey Acts can best be reconciled by a holding that the initiation of administrative proceedings under the Walsh-Healey Act is the commencement of an "action" for the purposes of the limitation provision.[15]

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[15] In *McMahon* v. *United States*, 342 U. S. 25, the Government took the position that the pendency of the administrative proceedings there concerned did not toll the statute of limitations. But we further pointed out that the maximum sixty-day waiting period involved in that case did not de-

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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prive the claimant of "a reasonable time within which to file" his claim. Brief for the United States, No. 17, Oct. Term 1951, p. 26 n. 17. The problem which the administrative proceedings required by the Walsh-Healey Act present is a completely different one from that posed by the fixed sixty-day waiting period involved in *McMahon*. Accordingly, we feel that there is no inconsistency in presenting the following additional suggestion to the Court:

Since under the scheme of the Walsh-Healey Act many normal incidents of the judicial process occur in the administrative proceedings, it would seem appropriate, if the issuance of a complaint by the Secretary of Labor is not regarded as the commencement of an enforcement action, to toll the statutory period during the pendency of the administrative proceedings so that the time consumed in part of the enforcement process would not be charged against the period of limitations. Cf. *McMahon* v. *United States*, *supra*, at 28. Though a relatively small portion of this particular claim would thus be saved; the effect of such a ruling would substantially mitigate the drastic effects of the decision in the *Locknit* case (*supra*, p. 33), and might afford a practicable means of devising new enforcement procedures.

APPENDIX A

1. Sections 1–6 of the Walsh-Healey Public Contracts Act, Act of June 30, 1936, 49 Stat. 2036, as amended, 41 U. S. C. 35–40, provide as follows (as they appear in the United States Code):

SECTION 1. That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of indus-

tries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week: *Provided*, That the provisions of this subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs 1 or 2 of subsection (b) of section 7 of an Act entitled "Fair Labor Standards Act of 1938";

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this subsection.

SEC. 2. Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account

such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

SEC. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

SEC. 4. The Secretary of Labor is authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to

time find necessary for the administration of this Act. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representatives designated by him, shall have jurisdiction to issue to such person an order requiring

such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and hereby is authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all

provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected: *Provided,* That whenever in his judgment such course is in the public interest, the President is authorized to suspend any or all of the representations and stipulations contained in section 1 of this Act.

2. The Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C., Supp. V, 251–262, provides as follows:

Part I

Findings and Policy

Section 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations,

halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and

adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in Commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

Part II

Existing Claims

SEC. 2. RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was en-

gaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

(e) No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any interest in such cause of action, shall

hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b).

SEC. 3. COMPROMISE OF CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) Any cause of action under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any action (whether instituted prior to or on or after the date of the enactment of this Act) to enforce such a cause of action, may hereafter be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee; except that no such action or cause of action may be so compromised to the extent that such compromise is based on an hourly wage rate less than the minimum required under such Act, or on a payment for overtime at a rate less than one and one-half times such minimum hourly wage rate.

(b) Any employee may hereafter waive his right under the Fair Labor Standards Act of 1938, as amended, to liquidated damages, in whole or in part, with respect to activities engaged in prior to the date of the enactment of this Act.

(c) Any such compromise or waiver, in the absence of fraud or duress, shall, according to the terms thereof, be a complete satisfaction of such cause of action and a complete bar to any action based on such cause of action.

(d) The provisions of this section shall also be applicable to any compromise or waiver heretofore so made or given.

(e) As used in this section, the term "compromise" includes "adjustment", "settlement", and "release."

Part III

Future Claims

SEC. 4. RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

Part IV

Miscellaneous

SEC. 5. REPRESENTATIVE ACTIONS BANNED.—

(a) The second sentence of section 16 (b) of the Fair Labor Standards Act of 1938, as amended, is amended to read as follows: "Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

(b) The amendment made by subsection (a) of this section shall be applicable only with respect to actions commenced under the Fair Labor Standards Act of 1938, as amended, on or after the date of the enactment of this Act.

SEC. 6. STATUTE OF LIMITATIONS.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;

(b) if the cause of action accrued prior to the date of the enactment of this Act—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to the date of the enactment of this Act, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after the date of the enactment of this Act unless at the time commenced it is barred by an applicable State statute of limitations.

SEC. 7. DETERMINATION OF COMMENCEMENT OF FUTURE ACTIONS.—In determining when an action is commenced for the purposes of section 6, an action commenced on or after the date of the enactment of this Act under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced.

SEC. 8. PENDING COLLECTIVE AND REPRESENTATIVE ACTIONS.—The statute of limitations prescribed in section 6 (b) shall also be applicable (in the case of a collective or representative action commenced prior to the date of the enactment of this Act under the Fair Labor Standards Act of 1938, as amended) to an individual claimant who has not been specifically named as a party plaintiff to the action prior to the expiration of one hundred and twenty days after the date of the enactment of this Act. In the application of such statute of limitations such action shall be considered to have been commenced as to him when, and only when, his written consent to become a party plaintiff to the action is filed in the court in which the action was brought.

SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency

of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

SEC. 10. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC.—

(a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act—the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act—the Secretary of Labor.

SEC. 11. LIQUIDATED DAMAGES.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 (b) of such Act.

SEC. 12. APPLICABILITY OF "AREA OF PRODUCTION" REGULATIONS.—No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of an activity engaged in by such employee prior to December 26, 1946, if such employer—

(1) was not so subject by reason of the definition of an "area of production", by a regulation of the Administrator of the Wage and Hour Division of the Department of Labor, which regulation was applicable at the time of performance of the activity even though at that time the regulation was invalid; or

(2) would not have been so subject if the regulation signed on December 18, 1946 (Federal Register, Vol. 11, p. 14648) had been in force on and after October 24, 1938.

SEC. 13. DEFINITIONS.—

(a) When the terms "employer", "employee", and "wage" are used in this Act in relation to the Fair Labor Standards Act of 1938, as amended, they shall have the same meaning as when used in such Act of 1938.

(b) When the term "employer" is used in this Act in relation to the Walsh-Healey Act or Bacon-Davis Act it shall mean the contractor or subcontractor covered by such Act.

(c) When the term "employee" is used in this Act in relation to the Walsh-Healey Act or the Bacon-David Act it shall mean any individual employed by the contractor or subcontractor covered by such Act in the performance of his contract or subcontract.

(d) The term "Walsh-Healey Act" means the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", approved June 30, 1936 (49 Stat. 2036), as amended; and the term "Bacon-Davis Act" means the Act entitled "An Act to amend the Act approved March 3, 1931, relating to the rate of wages for laborers and mechanics

employed by contractors and subcontractors on public buildings" approved August 30, 1935 (49 Stat. 1011), as amended.

(e) As used in section 6 the term "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

SEC. 14. SEPARABILITY.—If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby.

SEC. 15. SHORT TITLE.—This Act may be cited as the "Portal-to-Portal Act of 1947."

APPENDIX B

Legislative History of Section 6 of the Portal-To-Portal Act

[The following legislative history is, as suggested in the brief, a comprehensive review of the significant bills, debates, hearings and reports pertaining to Section 6 of the Portal-to-Portal Act.]

a. *Seventy-ninth Congress.*—A proposed uniform federal statute of limitations aimed at the creation of one federal limitations period for a large number of federal statutes was presented to the Seventy-ninth Congress, between the decisions of this Court in *Jewell Ridge Corp.* v. *Local No. 6167,* 325 U. S. 161; *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590, on the one hand, and *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680, on the other. This bill (H. R. 2788) and the bill which ultimately became the Portal-to-Portal Act (H. R. 2157, 80th Cong.) were both introduced by Representative Gwynee. As submitted to the House by the Judiciary Committee, H. R. 2788 declared that "except as otherwise specially provided by Act of Congress, no action for the recovery of wages, penalties, or other damages, actual or exemplary, pursuant to any law of the United States shall be maintained in any court unless the same was commenced within one year after such cause of action accrued." H. Rept.

No. 1141, 79th Cong., 1st Sess.[1] According to the Committee, the bill would affect, among other causes of action, "suits for double the amount involved plus costs and attorney fees for violation of sections of the Fair Labor Standards Act relating to minimum pay and maximum hours (29 U. S. Code, sec. 216)" and "suits by the United States for liquidated damages based on failure of any contractor to comply with terms of contract as to wages, hours, etc. (41 U. S. Code, sec. 36)." H. Rept. No. 1141, *supra;* p. 2.

Despite the broad language of the bill and this express statement in the Committee Report as to the scope of the bill, and despite earlier remarks by Congressman Gwynne, 91 Cong. Rec. 2928, the members of the Committee made it quite

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[1] In full, the bill provided as follows:

"That hereafter, except as otherwise specially provided by Act of Congress, no action for the recovery of wages, penalties, or other damages, actual or exemplary, pursuant to any law of the United States shall be maintained in any court unless the same was commenced within one year after such cause of action accrued: *Provided*, That causes of actions which had accrued prior to the passage of this Act, and which had not become barred by any applicable statute of limitation may be maintained if commenced within six months after the date of enactment: *Provided further*, That no liability shall be predicated in any case on any act done or omitted in good faith in accord with any regulation, order, or administrative interpretation or practice, notwithstanding that such regulation, order, interpretation, or practice may, after such act or omission, be amended rescinded, or be determined by judicial authority to be invalid or of no legal effect. No limitation under this Act shall apply if the person liable for such damages shall not be found within the United States, within the same period, so that proper process may be instituted and served against such person."

clear during the debates in the House that the bill did not apply to civil or criminal suits by the Government. 92 Cong. Rec. 5293, 5294, 5295, 5298, 5299, 5301, 5305. Thus Mr. Gwynne stated (92 Cong. Rec. 5295):

> Now, to get on to what the bill does not cover. The bill does not cover criminal prosecutions, Mr. Justice Drew Pearson to the contrary notwithstanding. *It does not cover injunctions or any kind of special proceedings whatever.* It does not cover any Federal statute giving anyone the right to sue if a special period of limitation is provided in the particular statute. For example, you will recall that in the price-control law we provided that under certain circumstances a purchaser may sue a seller for $25 or $50 or something of that kind. We wrote into that statute a year's limitation. So that is not affected by this particular bill. Finally, *it does not affect suits brought by the United States Government itself* for the following reason: At common law a general statute beneficial to the crown affected the crown, but any restrictive statute did not bind the sovereign; it did not apply to the sovereign unless the sovereign was specifically named in the statute. That rule has been affirmed by our own Supreme Court on many occasions. Those of you who are interested might read the case of *United States* v. *Heron* (21 Wall. 251) and *United States* v. *Thompson* (98 U. S. 456), where the Court held a statute of limitation, for example, which is restrictive does not apply to the Government unless the Government is specifically named. The Court also held to the same effect in connection with insolvency statutes.

> However, recent decisions, as is often the case, have in the minds of some people thrown a little doubt on what the Supreme Court might hold. *I had no intention of writing a statute to cover the Government.* So the committee did the conservative thing and in the report set out all the statutes that could possibly be affected, whatever position might be taken by the Court in the future on the theory I have just related. In order to avoid any possible trouble whatever, we thought it would be well—in fact, an amendment will be offered by the gentleman from Tennessee [Mr. KEFAUVER] to make it clear that this bill does not apply to any suits brought by the Government. [Emphasis supplied.]

Subsequently, Mr. Hobbs, who submitted the report from the Judiciary Committee, offered an amendment for that purpose, adding the proviso "except actions brought by the United States as the real party in interest" after the words "no action * * * pursuant to any law of the United States." 92 Cong. Rec. 5305. In response to an inquiry from Mr. Kefauver, who proposed, in behalf of Mr. Walter,[2] to insert the language "That the provisions of this Act shall not apply to actions in which the United States or an agency or an officer thereof is plaintiff," Mr. Hobbs stated that both amendments would accomplish the same purpose. *Ibid.* Mr. Kefauver did not,

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[2] Mr. Walter, a member of the Committee, had filed a minority report expressing the view that the bill would have a detrimental effect upon law enforcement if applicable to actions by the United States. See H. Rep. No. 1141, *supra*, Part 3.

> Mr. VORYS. Can the employee recover for any work for which his employer agreed to pay him under the longer statute of limitations? I think that is obviously the case.
>
> Mr. CELLER. If the claim is brought under the Bacon-Davis Act or under the Walsh-Healey Act, or under the Fair Labor Standards Act, if we pass this bill which is applicable to all three acts, there is only 1 year in which the claim can be brought in court.
>
> Mr. VORYS. That is perfectly true, but the man would still have his right under the common law to recover if the employer agreed to pay him.

In sum, there is substantial evidence for the view that the limitations provision of H. R. 2157, as passed by the House, was not intended to apply to suits by the United States.

(ii) *Senate.*—After its passage in the House, H. R. 2157 was referred to the Senate Judiciary Committee. Earlier, that Committee had held hearings on S. 70, a bill introduced by Senator Wiley, which sought to amend the Fair Labor Standards Act in order to exempt employers from liability for portal-to-portal claims. This bill, and a substitute offered by Senator Capehart, were limited to the Fair Labor Standards Act and had no reference to the Walsh-Healey and Bacon-Davis Acts. See Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 80th Cong., 1st Sess., on S. 70, pp. 3–5. Neither the Wiley bill nor the Capehart substitute was reported out by the Committee. Instead, the Committee reported out the House-passed Gwynne bill, H. R. 2157, with an amend-

ment in the nature of a substitute. S. Rep. No. 48, 80th Cong., 1st Sess. This substitute was ultimately passed by the Senate without significant amendment.[8]

The limitations provisions of H. R. 2157, as amended by the Senate, were contained in what was then Section 9 of the bill. Subsection (a) of Section 9 provided that:

> The Fair Labor Standards Act of 1938, as amended, is further amended by adding at the end of section 16 the following new subsection:
>
> (c) (1) Every claim under this Act for unpaid minimum wages, unpaid overtime compensation, or an additional amount as liquidated damages, accruing prior to or on or after the date of enactment of the Portal-to-Portal Act of 1947, shall be forever barred unless, within two years after such claim accrued, suit to enforce such claim is commenced in a court of competent jurisdiction.
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> * * * * *

Subsection (b) (1) similarly provided that:

> Every claim under the Walsh-Healey Act or the Bacon-Davis Act for unpaid minimum wages or unpaid overtime compensation, *and under the Walsh-Healey Act for an additional amount as liquidated or other damages,* accruing prior to or on or after the date of enactment of the Portal-to-Portal Act of 1947, shall be forever barred unless, within 2 years after such claim accrued, suit to enforce such claim is commenced in a court of competent jurisdiction. [Emphasis supplied.]

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[8] The text of the bill as passed by the Senate is set forth at 93 Cong. Rec. 2375–2377.

It might be argued from this language that the Committee intended the limitations bar to apply to suits by the United States under the Walsh-Healey Act. On this score, the Committee report states only that "Subsection (b) of this section amends the Walsh-Healey Act and the Bacon-Davis Act setting up a 2-year statute of limitations with respect to claims accruing under such acts prior to or on or after the date when this bill becomes law" (S. Rep. No. 48, *supra*, p. 51). In our view, both the bill and the report are ambiguous and leave the matter at large.

Whatever the actual intention of the Committee may have been, it is apparent that it acted on a misconception of the enforcement provisions of the Walsh-Healey Act. Thus, subsection (b) of Section 9 of the bill speaks of "an additional amount as liquidated or other damages" under the Walsh-Healey Act; similarly, the statement of findings in Section 1 of the Senate bill states that "The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (*except as to liability for attorney's fees and, in the case of the Bacon-Davis Act, for liquidated damages*) arise with respect to the Walsh-Healey and Bacon-Davis Acts * * *" [emphasis supplied]; and Section 10 (2) of the Senate bill provides that "no liability for an additional amount as liquidated or other damages under the Walsh-Healey Act" shall be predicated on an act done in good faith in reliance on an administrative ruling. But unlike the Fair Labor Standards Act, there is no

provision in the Walsh-Healey Act for "additional" liquidated damages.

This misconception may possibly be ascribed to the fact that the Committee had received no testimony with respect to the Walsh-Healey and Bacon-Davis Acts during the hearings, and was unfamiliar with their provisions. See 93 Cong. Rec. 2123–2124. It was in this connection that the dissenting members of the Committee pointed out, "there is nothing in the record * * * which in any way makes them a part of the portal-to-portal problem" (S. Rep. No. 48, *supra*, Part 2, p. 2). And it was for this reason—that there was no evidence of any kind before the Senate as to the necessity for including the Walsh-Healey and Bacon-Davis Acts in the bill to attain the basic objective of barring portal-to-portal claims—that the opponents of the bill attacked its provisions with respect to those Acts. See 93 Cong. Rec. 2088, 2123, 2250, 2352.

In any event, when called upon during the course of debate in the Senate to explain the inclusion of the Walsh-Healey and Bacon-Davis Acts, the principal proponents of the bill repeatedly stated that their purpose was to bar possible employee suits under those Acts which would circumvent the basic purpose of the Portal-to-Portal Act. Thus, indicating that the Committee had no other purpose, Senator Donnell, Chairman of the Senate Subcommittee which considered the bill, declared that "there is unquestionably a right on the part of employees * * * to assert their rights under the Bacon-Davis or the Walsh-Healey Act. The mere fact that, so far as I know, no such claims [for portal-to-portal

therefore, offer the Walter amendment, and the Hobbs amendment was agreed to. *Ibid.*

This amendment did not make the bill wholly inapplicable to the Walsh-Healey Act since it was apparently assumed that employees could sue under that Act as well as the Fair Labor Standards Act. Thus, Mr. Keefe suggested that the proposed one-year limitation be increased to two years, stating that this "will give adequate time for every employee to bring his action within that period of time against the employer when the facts disclose that he has in fact been underpaid under the provisions of the Walsh-Healey or the Wages and Hours Act." 92 Cong. Rec. 5293.

The bill as passed by the House was reported out by the Senate Judiciary Committee with a minor amendment. S. Rep. No. 1395, 79th Cong., 2d Sess. However, on the floor of the Senate, the Committee substituted an entirely new bill, applicable only to the Fair Labor Standards and Walsh-Healey Acts, which had been drawn by the Department of Justice. The meaning of the provisions of the substitute amendment was not explained to the Senate, and the amendment was passed without debate. 92 Cong. Rec. 10337, 10372, 10373.[3] However, the differences between the House and Senate versions of the bill were not resolved prior to the adjournment of Congress, and the bill died.

b. *Eightieth Congress.*—In the succeeding Congress, after the decision in the *Mt. Clemens* case, Mr. Gwynne introduced a new and broader bill.

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[3] The text of the bill passed by the Senate is set forth at 92 Cong. Rec. 10372.

Subsequent to the hearings held on that bill (H. R. 584), a revised bill was agreed upon, introduced, and reported as H. R. 2157. The latter bill, after considerable amendment, ultimately was enacted as the Portal-to-Portal Act.

(i) *House of Representatives.*—In pertinent part, H. R. 584 imposed a one-year period of limitation on "every action for the recovery of wages, overtime compensation, penalties, or damages (actual, liquidated, or compensatory), pursuant to any law of the United States" (Sec. 2).[4] This provision was quite similar to that contained in the earlier bill, H. R. 2788, 79th Cong. Although such language in the earlier bill had been deemed by its proponents to be inapplicable to suits by the United States, Mr. Walling, the Wage and Hour Administrator, stated during the course of the House Hearings on the bill in answer to a question from Mr. Walter, that "I suppose that it would apply the uniform statute of limitations by way of amendment to recoveries under all of those statutes [Fair Labor Standards, Walsh-Healey and Bacon-Davis Acts] for wages earned but not paid. * * * The effect of this would be seriously to weaken the effectiveness and enforceability of these Acts. * * *" Hearings before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess., pp. 264–265. Other witnesses, however, appearing

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[4] The text of H. R. 584 is set forth at pages 1–3 of the Hearings before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess., on H. R. 584.

in behalf of industry apparently did not so read the bill.[5]

The testimony of Mr. Smethurst, counsel for the National Association of Manufacturers, is

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[5] Thus, Mr. Smith, Assistant General Counsel of the United States Chamber of Commerce, when asked if he would object to a provision that the United States would be excepted on the matter of limitations, replied (*id.* at 17):

"Of course, that would depend upon whether the committee decided to recommend a broad statute of limitations applicable to all types of actions arising under the Federal law or whether it enacted a limitation applicable only on matters arising under the Fair Labor Standards Act. Possibly it might decide to enact one limited to only a limited class or type of cases. The degree of desirability of the exception for the United States would be related to the character of statute that was finally embodied in the legislation. If it were a broad, general statute of limitations applicable to all types of actions arising under Federal law, it doubtless would be necessary to provide some exemptions in the case of actions brought by the United States Government."

In a colloquy with Mr. Walter, Mr. Haley, attorney for the National Coal Association, proposed an amendment to H. R. 584, stating (*id.* at 385):

"* * * I am not completely convinced that it is necessary, but the sole purpose of the proposed amendment is to make clear that the law will not apply to the United States, when it is a party on its own account, either party plaintiff or party defendant.

"Mr. WALTER. I suppose this section is designed to meet the objections that I made to the Goodwin bill [sic] last year?

"Mr. HALEY. It is designed to meet, yes, the general objections to including the United States when it is the real party at interest. The purpose of my amendment, however, is not to take the United States Government out of the limitation under the Walsh-Healey Act. It would apply to the United States Government under the Walsh-Healey Act only when the United States is suing or being sued on its own account.

particularly interesting in view of subsequent changes to the language of the bill (*id.* at 458):

> Mr. SMETHURST. Just one further point on another provision of the Act. It refers to only actions or causes of action. Presumably it would not deal with this problem under the Public Contracts Act, the Walsh-Healey Act, where there is absolutely no limitation on the time in which the Administrator can proceed backwards, without limitation, to the date when the act was passed in 1936. That is an administrative proceeding. I doubt if it would come within the definition of "action" or "cause of action." But as it stands today he can proceed back with contracts that were performed years and years ago and hold that there was a violation in their performance, and request the employer to reimburse the Government, and then the 1-year provision comes into effect, after the Government has collected from the contractor, and the employees of that contractor have 1 year in which to collect.
>
> But the reference to the "action or cause of action" probably would not get administrative proceedings brought for recovery under the Public Contracts Act.
>
> Mr. GWYNNE. What additional wording would you suggest for that purpose?
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> Mr. SMETHURST. It seems to me just the word "proceedings." "Any action or proceeding" in which the Government is acting not as the real party at interest. Because in those cases the Government is not the real party at interest. They are acting on behalf of someone.
>
> Mr. GWYNNE. Does the Government or Administrator actually bring an action

there? How does he collect his money? Does he not sue in the courts?

Mr. SMETHURST. He may if he is forced to that. But most of the time he sends out a trial examiner, and they hold a hearing, and determine that so much is due. And then he makes an assessment. If the contract has been settled, the Government cannot withhold from the contract price, so he will make an assessment, that restitution should be paid in such an amount. If you do not, he can put you on the blacklist for 3 years.

Mr. WALTER. As a practical matter, what the Government does is to proceed before final settlement is made, and then withholds from the final payment whatever it is determined is owed.

As reported out by the House Judiciary Committee, and as passed by the House without amendment, the limitations provision of the revised bill H. R. 2157 (Sec. 2) was virtually identical to that contained in H. R. 584. It proposed a one-year limitation on "every claim, cause of action, and action for the recovery of wages, overtime compensation, penalties, or damages (actual, liquidated, or compensatory), pursuant to any of the laws of the United States."[6]

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[6] The text of H. R. 2157 as reported, and as passed by the House without amendment, is set forth at 93 Cong. Rec. 1517, 1556. Section 2, in pertinent part, states as follows:

"Every claim, cause of action, and action for the recovery of wages, overtime compensation, penalties, or damages (actual, liquidated, or compensatory), pursuant to any of the laws of the United States mentioned in section 5 hereof shall be subject to the following limitations and conditions:

"(a) Hereafter no such action shall be maintained unless

Significantly, the word "proceeding" was not added to the limitations provision but was added to the section which barred portal-to-portal claims (Sec. 3). The word "proceeding" ultimately was incorporated into the "portal-to-portal claims" and "good faith reliance" sections of the bill as enacted (Secs. 2, 9 and 10, 29 U. S. C., Supp V, 252, 258, 259), but was omitted from the limitations provision of Section 6 of the Act.

With respect to the effect of the limitations provision then contained in Section 2 of H. R. 2157 upon suits by the Government, the report of the House Judiciary Committee is silent. But in pertinent part, the report declares that "the desirability of a uniform Federal statute of limitations has often been pointed out. In the absence of such a statute, courts are required to enforce the State statute deemed to be applicable. (See

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the same is commenced within one year after such cause of action accrued.

"(b) No such claim or cause of action which had accrued prior to the effective date of this Act, and which would otherwise be barred by subsection (a) hereof, shall be maintained unless action thereon is commenced within 6 months after the effective date of this Act: *Provided, however*, That this subsection shall not be construed to revive or extend any claim or cause of action which but for the enactment of this Act would have been barred by any statute of limitation applicable to such action.

"(c) An action shall be deemed to have been commenced as to any individual claimant as of the date when such claimant is named in such action as a party thereto.

"(d) If at any time within such 1-year period or 6-month period, as the case may be, process may not be served on the person liable by reason of his absence from the United States, the period of such absence shall be disregarded in computing the applicable period."

U. S. Code, title 28, sec. 725.) This has caused confusion and a lack of uniformity throughout the Nation." H. Rep. No. 71, 80th Cong., 1st Sess., p. 7.

Since the Committee was fully aware that state statutes of limitations are inapplicable to the United States (see *supra*, pp. 95–96), it would appear that the limitations provision was not directed to suits by the United States but was intended merely to displace the varied state statutes applicable to employee suits by a uniform federal statute.[7]

On the other hand, it should be noted that Messrs. Walter and Keating filed a statement of "additional views" in which they declared that "the proposal that such a period of limitations also applies to actions brought by the United States is * * * objectionable." H. Rep. No. 71, *supra*, p. 21. Since the report itself says nothing about applying the period of limitation to the Government, this statement may be considered to have been made out of an abundance of caution. It must be remembered that Mr. Walter had made a similar objection in the Seventy-ninth Congress to H. R. 2788 (see *supra*, p. 96, n. 2), and that the Committee members had stated then during the course of debate that such language did not apply to the United States (see *supra*, pp. 95–96).

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[7] The testimony before the Committee with respect to the question of limitations was primarily concerned with the applicability of state statutes of limitations to employee suits. See House Hearings, *supra*, pp. 39–42, 84–87, 120–123, 149–153, 161–162, 258–260, 297–300, 448–449, 466–467.

Examination of the debate in the House would appear to confirm our reading of the limitations provision of H. R. 2157 and the purport of the statement of "additional views" filed by Messrs. Walter and Keating. Although the proposed limitations provision occasioned considerable debate, no statement was made during the course of the debate that the provision was intended to be applicable to suits by the United States. Significantly, although Messrs. Walter and Keating argued in favor of an amendment providing a longer period of limitation (93 Cong. Rec. 1512–1513, 1557–1558, 1558–1559), neither of them proposed an amendment to exclude suits by the United States from the limitations provision. With respect to the limitations provision, the attention of the House was directed to the advisability of displacing the varying state statutes of limitations applicable to *employee* suits by a uniform federal statute of limitations, and the sole point in controversy was the proposed length of such uniform period of limitation. 93 Cong. Rec. 1491, 1495, 1498, 1500, 1502–1503, 1504, 1506–1507, 1512–1513, 1515, 1556, 1557–1558, 1558–1559, 1560, 1561.

That the limitations provision was not intended to apply to suits by the United States is further illustrated by the following colloquy between Mr. Walter and Mr. Hobbs, a member of the Committee, during which Mr. Hobbs stated that the limitations provision was inapplicable to criminal actions brought by the United States (93 Cong. Rec. 1559):

> Mr. WALTER. * * * But is it not a fact that employers, under the law, must

retain their records for a period of three years?

Mr. HOBBS. That is my understanding. This is just warmed-over food from last year, and the House is going to eat it the same way they did before, because they know it is good and we are hungry. Anybody who has an honest claim under any of these civil statutes—which have no relation at all to the statutes of limitations in criminal cases—can certainly file his suit, if he thinks he has a case, within twelve months. Not only is that common sense, but it is justice, and is preeminently fair to every honest claimant.

In another context, the following statement of Mr. Bryson, a member of the Committee, is equally pertinent (93 Cong. Rec. 1501):

> This bill is applicable to every claim, cause of action, and action for the recovery of wages, overtime compensation, penalties, or damages—actual, liquidated, or compensatory—pursuant to the act of August 30, 1935 (49 Stat. 1011); the act of June 30, 1936 (49 Stat. 2036, the Walsh-Healey Act); and the act of June 25, 1938 (52 Stat. 1060, the Fair Labor Standards Act). The bill requires that all actions predicated upon the foregoing acts for the foregoing reasons shall be brought within 1 year after the cause of action accrues but requires that all actions accrued upon the date of approval of this bill shall be brought within 6 months. This provision, I think, is constitutional, for all that is required in such cases is that a reasonable time be allowed in which to bring suit. See *Mills* v. *Scott* (99 U. S. 25); *Vance* v. *Vance* (108 U. S. 514); *Wilson* v. *Isminger*

(185 U. S. 55); *Atchafalaya Land Co.* v. *F. B. Williams Cypress Co.* (250 U. S. 190).

Since the Constitution does not require that the United States be given a reasonable time to bring suit, congressional concern over the constitutionality of the proposed limitations provision tends to show that it was directed solely to suits by employees.

It should be noted that our view of the intention of Congress respecting the limitations provisions does not render the inclusion of the Walsh-Healey Act meaningless. As in the 79th Congress, it was apparently again assumed that the Walsh-Healey Act, as well as the Fair Labor Standards Act, conferred a right of action upon employees. Thus, Mr. Allen, Chairman of the Rules Committee, in explaining the purpose of the bill at the outset of debate, stated that "In effect, this bill would outlaw claims for make-ready time in portal-to-portal suits. It would also establish restrictions on actions of employees to recover other forms of overtime pay to which they have no just claim. To this extent, this bill would repeal those sections of the Fair Labor Standards Act, the Walsh-Healey Act, and the Bacon-Davis Act which are inconsistent with its provisions." 93 Cong. Rec. 1435. The Walsh-Healey Act was similarly interpreted by Mr. Celler, who vigorously opposed a one-year period of limitation, during a colloquy with Mr. Vorys over whether the proposed federal period of limitation would completely supplant the longer state statues (93 Cong. Rec. 1495):

pay] have been made is not at all conclusive as to whether or not such claims have been made or hereafter will be made" (93 Cong. Rec. 2088). Similarly, Senator Cooper, also a member of the Subcommittee, stated that "even though as yet no suits have been filed under those acts [Walsh-Healey and Bacon-Davis], the contingent liability exists * * * and it seems to me that contracts entered into under those two acts present a contingent liability. *There is the opportunity for employees to sue* * * *," 93 Cong. Rec. 2130. [Emphasis supplied.] See also 93 Cong. Rec. 2098, 2123–2124.

Indeed, the opponents of the bill apparently subscribed to this view of the Walsh-Healey Act. Arguing against the inclusion of the Walsh-Healey and Bacon-Davis Acts in the bill, Senator McGrath stated that "no suits would be brought under either of these Acts for this type of compensation. It lies in the simple fact that in neither the Walsh-Healey Act nor the Bacon-Davis Act is any provision made for liquidated damages. So no employee would be well advised by counsel to bring a suit of this kind save under the Fair Labor Standards Act, and so none have been brought," 93 Cong. Rec. 2088.

In the ensuing colloquies between Senators McGrath and Donnell, the Committee's misconception of the liquidated damages provision of the Walsh-Healey Act was seemingly corrected. In answer to Senator McGrath, Mr. Donnell agreed "that there is no tremendous liability for the liquidated damages under the Walsh-Healey Act" but called attention to the fact that the Walsh-Healey Act contained a liquidated damages provision. 93 Cong. Rec. 2241. The following

exchange then occurred (93 Cong. Rec. 2241–2242):

> Mr. McGRATH. I should like to keep the record straight at this point. In the discussion I had with the Senator from Missouri a few days ago we were speaking about the fact that no portal-to-portal case, so-called, has yet been brought under either the Walsh-Healey Act or the Bacon-Davis Act. I made the remark that the reason for this was that no amount was allowed under those acts to the employee as liquidated damages. The Senator from Missouri questioned the accuracy of that statement and now reads a provision from the general statute to the effect that there is a liability running to the United States by virtue of a violation of the Walsh-Healey Act. We were not talking about liability to the United States; we were talking about what an employee could recover for himself in a suit brought against his employer. So I think, Mr. President, that I was accurate in my statement the other day, and I am still accurate, that there is no reason whatsoever why any employee would consider bringing or be well advised to bring a suit for portal-to-portal activities under any act save the Fair Labor Standards Act of 1938. I believe that probably answers the inquiry of the Senator from Missouri in respect to that point.
>
> Mr. DONNELL. I thank the Senator for his answer. I think the Senator will agree that the quotation I read is an accurate quotation from the Walsh-Healey Act.
>
> Mr. McGRATH. I agree it is a correct quotation, but I agree also that it does not concern itself with what we were speaking about the other day, namely, what rights

> an employee has as against his employer for what we call liquidated damages. * * *

In the light of this discussion, it became apparent that, whether intended or not, the language of subsection (b) (1) of Section 9 of the Senate bill might have some undefined collateral effects on suits by the United States. Arguing in favor of an amendment proposed by Senators McGrath and McCarran which would *inter alia* strike the Walsh-Healey and Bacon-Davis Acts from the bill (93 Cong. Rec. 2366), the former stated (93 Cong. Rec. 2254–2255):

> * * * With reference to limitations of action section 9 (b) (1) limits suits by employees against their employer to a period of two years. It assumes, however, that an employee suing his employer under this act can recover double damages in such an action, as is the case in suits under the Fair Labor Standards Act, where the employee can recover an additional amount as liquidated damages. The Walsh-Healey Act does not permit an employee to recover such an additional amount in a suit against his employer. Double recovery can be had by an employee only, if at all, when, after the employee has recovered his unpaid wages, the Government sues the employer and recovers under section 2 of the act for liquidated damages for breach of contract, and subsequently pays the money recovered over to the employee who was underpaid. If the phrase "an additional amount as liquidated damages" has any meaning, it applies to that situation. It seems hardly just to penalize the employee because the Government is dilatory in

> bringing action against the employer. This is particularly true since it applies only to those employees who brought their actions early. Moreover, it makes the Government's right to recover dependent on the inactivity of employees.

This statement appears to us ambiguous and inconclusive in that, although the primary emphasis is on employee suits, there is, possibly, the incorrect assumption that the Government might only maintain a suit in default of an earlier suit by the employee. On the other hand, the reference to limitations is limited to employee suits.

In opposition to this amendment, Senator Donnell replied (93 Cong. Rec. 2364):

> Mr. President, those two acts should be included. In the first place, it is true, of course, that few suits, if any, have been filed hitherto under the Bacon-Davis Act or the Walsh-Healey Act. The reason is clear. It is that under those acts all a man can recover is the amount of wages to which he is entitled. Under those acts no one is entitled to recover liquidated damages equal to the amount of wages to which he is entitled. However, Mr. President, two facts should be noted. In the first place, great difficulties may develop for employers in the future, under the Fair Labor Standards Act, because in the case of war contracts, there is great doubt whether suits, even though nominal, against employers are in fact against the Government, and obviously under the Fair Labor Standards Act a suit cannot, by the express provisions of that act, be maintained against the Government.
>
> * * * * * *

> Mr. President, suppose the Congress enacts the pending bill but does not include its references to the Walsh-Healey and Bacon-Davis Acts. Then a man who files suit under the Fair Labor Standards Act will find such suit cancelled and nullified by the action of Congress. What will he do then? If he is an employee working in a plant which makes any material for the benefit of the Government, and which comes under the Walsh-Healey Act, he will join with other employees in requesting—yes, demanding—of the Secretary of Labor that a suit be filed for his protection under the Walsh-Healey Act because he has lost his protection under the Fair Labor Standards Act.

Senator Donnell then pointed out that (93 Cong. Rec. 2364):

> to abandon the protection of the Walsh-Healey Act and the Bacon-Davis Act would be the part of absolute mistake, and would be the poorest sort of judgment. Why did the House of Representatives include it? I understand that some jurisdictional point was involved. I do not know the full details regarding it, but I undertake to say that, whether wittingly or unwittingly, they placed in the bill a wholesale protection for the Government of the United States which we would be foolish indeed to leave out of our bill.

The McGrath-McCarran amendment was subsequently defeated (93 Cong. Rec. 2367), and the bill passed in the form proposed by the Committee (93 Cong. Rec. 2375).

We think it is a fair summary of the Senate history of H. R. 2157 to say that the proponents

of the bill were principally concerned with the possible increased financial burden to industry and to the Government which might result if portal-to-portal claims under the Fair Labor Standards Act were barred, only to be then allowed in the guise of employee suits under the Walsh-Healey and the Bacon-Davis Acts. Likewise, the opponents of the bill joined issue only on the question whether a sufficient showing had been made which would necessitate barring employee suits under the Walsh-Healey and Bacon-Davis Acts to attain the basic purpose of barring portal-to-portal claims.

(iii) *Conference Committee.*—Following its passage by the Senate in amended form, H. R. 2157 was referred to a Committee of Conference. The misconception of the Senate Judiciary Committee concerning the liquidated damages provisions of the Walsh-Healey Act was apparently discovered by the Conference Committee, which corrected that misconception by changing the bill in three respects: First, the parenthetical statement in Section 1 of the Senate bill (see *supra*, p. ~~109~~) was changed to the version enacted into law. The Committee thus recognized that the Walsh-Healey Act did not allow recovery of additional sums as liquidated damages, and manifested its understanding that the problem confronting Congress had reference solely to the liquidated damages provision of the Fair Labor Standards Act. In conformance with this change in the Statement of Findings in Section 1, the Committee also eliminated from the Senate bill the language in Sections 9 (b) (1) and 10 (2) which spoke of liability "for an additional amount

as liquidated damages under the Walsh-Healey Act" (see *supra*, p. 109). In making the change, the Committee, adopting the 2-year limitation of the Senate bill, combined the limitations provisions relating to all three acts and simplified the language. In so doing, the present Section 6 was created.

The Conference report contains no intimation that the present Section 6 was intended to be applicable to suits by the United States under either of the Acts. To the contrary, the thrust of the report of this Committee is on the manner in which the varying state statutes of limitations—which, as we have pointed out, are inapplicable to the United States—would be superseded by the new uniform federal period of limitation. H. Rep. 326, 80th Cong., 1st Sess., pp. 13–14. Similarily, Mr. Gwynne, in explaining the Conference report, which was agreed to without debate (93 Cong. Rec. 4372, 4391), stated that (93 Cong. Rec. 4388):

> * * * Under this bill all causes of action arising in the future, and by that I mean after the effective date of the act, must be brought within 2 years after the cause of action accrues. As to causes of action accruing prior to the effective date of the act, action must be brought either within 2 years or within the applicable State statute, whichever is shorter. That provision became necessary when the statute of limitations was raised from 1 year to 2 years in order to protect certain States that now have a 1-year statute of limitations. Any cause of action that has accrued prior to the effective date of this act may be brought within 120 days after the act be-

> comes effective, subject, however, to the provision that any cause of action barred by any State statute, whatever the length of it may be, is not revived. That action remains barred.

Further, although the Conference report is silent with respect to the applicability of Section 6 to the United States, it elsewhere expressly points out the Committee's understanding that employers will be relieved from criminal actions, as well as civil liability, under Sections 2, 9 and 10. H. Rep. 326, *supra*, pp. 9, 11, 16. The changes made by the Conference Committee and the explanations offered by the Committee of those changes are persuasive evidence that the Walsh-Healey Act was included in Section 6 of the Portal-to-Portal Act not to curtail enforcement actions brought by the Government but to prevent possible flanking attacks by employee suits under that statute which would nullify the effect of the amendments to the Fair Labor Standards Act.[9]

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[9] We think it pertinent to observe that the position for which the Government here contends was expressly brought to the attention of Congress shortly after the enactment of the Portal-to-Portal Act. The House Committee on Education and Labor was advised by Mr. Tyson, Solicitor of the Department of Labor, that Section 6 of the Act did not apply to criminal prosecutions and injunction proceedings brought by the Government under the Fair Labor Standards Act, and did not apply to actions by the Government to recover liquidated damages under the Walsh-Healey Act. See Hearings Before Subcommittee No. 4 of the Committee on Education and Labor, House of Representatives, 80th Cong., 1st Session, on proposed amendments of the Fair Labor Standards Act of 1938, Vol. 4, pp. 2711-2723, Dec. 17, 1947. Although thus informed, Congress apparently took no action in this connection.

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